

No. 15973 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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MILDRED BECKER SCHULTZ,

Appellant,

vs.

JACK HOLMES, et al.,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division

FILED

JUL 15 1958

PAUL P. O'BRIEN, CLERK



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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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and Range Songs, Inc., et al.





United States District Court for the Southern  
District of California, Central Division

Civil Action No. 17261C

(Transferred From Northern District of California,  
Northern Division, File No. 33536.)

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES; CHARLES DOUGLAS HONE;  
LINDLEY A. JONES, CARL HOEFLE and  
DELMAR S. PORTER, Copartners, Individually and as Copartners, Doing Business Under the Fictitious Firm Name and Style of TUNE TOWNE TUNES; HILL AND RANGE SONGS, INC., a Corporation; CAPITOL RECORDS, INC., a Corporation; CAPITOL RECORDS DISTRIBUTING CORPORATION, a Corporation; RUMBA- LERO MUSIC, INC., a Corporation; BMI BROADCAST MUSIC, INC., a Corporation; COLUMBIA RECORDS, INC., a Corporation; DECCA RECORDS, INC., a Corporation; RADIO CORPORATION OF AMERICA, a Corporation; MGM RECORD DISTRIBUTORS; DOE I, DOE II, DOE III, DOE IV, DOE V and DOE VI,

Defendants.

### AMENDED COMPLAINT

(Infringement of Copyright and  
Unfair Competition)

Comes now the plaintiff and for cause of action against the defendants and each of them alleges:

1. This action arises under the Act of July 30, 1947, 61 Stat. 652, as amended, United States Code, Title 17, as hereinafter more fully appears, and jurisdiction is founded upon Title 28, United States Code Sec. 1338 (a) and (b). [10\*]

2. Prior to April 7, 1941, plaintiff, who then was and ever since has been a citizen of the United States, created, wrote and composed an original musical composition entitled "Good Old Army," and prior to June 27, 1949, plaintiff created, wrote and composed a further version of said original music composition, which version was entitled "Waitin' For My Baby," which musical composition, under either or both names, is hereinafter for convenience called "the musical composition."

3. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Doe I, Doe II, Doe III, Doe IV, Doe V and Doe VI, and when said true names are discovered, plaintiff will ask leave of Court to amend this complaint to insert the true names of said defendants.

4. The musical composition contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

5. Plaintiff has heretofore complied in all respects with the Act of July 30, 1947, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

the copyright of the musical composition and received from the Register of Copyrights certificates of registration for the musical composition dated and identified as follows:

Title: "Good Old Army" (unpublished),

Class: E. Registration No. 172341.

Date: April 7, 1941.

Title: "Waitin' For My Baby" (unpublished),

Class: E. Registration No.: 254497.

Date: July 7, 1949.

6. Plaintiff did not, either before or after April 7, 1941, publish the musical composition, but plaintiff did disseminate the musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry, and plaintiff is informed and believes and, basing her allegation on that ground, alleges that defendants and each of [11] them received copies of the musical composition.

7. Since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to said copyrights in the musical composition. After April 7, 1941, defendants infringed said copyright No. 254497, and after July 7, 1949, defendants infringed said copyright No. 172341, by publishing and placing on the market a musical composition hereinafter for convenience called "the infringing composition," sometimes entitled "Happy Pay Off Day," and sometimes entitled "The Blacksmith Blues," which infringing

composition was copied largely from the musical composition.

8. A copy of the musical composition in the original form entitled "Good Old Army" is attached hereto as Exhibit 1. A copy of the musical composition in the version entitled "Waitin' For My Baby" is attached hereto as Exhibit 2, and a copy of the infringing composition is attached hereto as Exhibit 3.

9. Plaintiff has notified defendants that defendants have infringed plaintiff's said copyrights, and defendants have nonetheless continued to infringe said copyrights.

10. Defendants and each of them unfairly used the results of plaintiff's labors and have incorporated such results in the infringing composition, and after April 7, 1941 and continuously since about 1950 defendants and each of them have been publishing, selling and otherwise marketing the infringing composition and have thereby been engaging in unfair trade practices and unfair competition against plaintiff, and plaintiff is informed and believes and on that ground alleges that defendants and each of them will continue to publish, sell and market the infringing composition in the same manner aforesaid—all to plaintiff's irreparable damage.

Wherefore, plaintiff demands:

1. That defendants and each of them, their agents and [12] servants be enjoined during the



pendency of this action and permanently from infringing said copyrights of plaintiff in any manner and from publishing, selling, marketing, or otherwise disposing of any copies of the musical composition entitled "Happy Pay Off Day" and "The Blacksmith Blues."

2. That defendants, and each of them, be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of said copyrights and said unfair trade practices and unfair competition, and to account for:

(a) All gains, profits and advantages derived by defendants, or any of them, by said unfair trade practices and unfair competition; and

(b) All gains, profits and advantages derived by defendants, or any of them, by their infringement of plaintiff's copyrights, or such damages as to the Court shall appear proper within the provisions of the copyright statutes, but in any event not less than the statutory minima.

3. That defendants, and each of them, be required to deliver up to be impounded during the pendency of this action all copies of said musical composition entitled "Happy Pay Off Day," also known as "The Blacksmith Blues," in their possession or under their control and to deliver up for destruction all infringing copies and all plates, molds or other matter for making such infringing copies.

4. That defendants, and each of them, pay to plaintiff the costs of this action and reasonable attorneys' fees to be allowed to the plaintiff by the Court.

5. That plaintiff have such other and further relief [13] as is just.

KENNETH N. CHANTRY and  
DAVID MELLINKOFF,

By /s/ DAVID MELLINKOFF,  
Attorneys for Plaintiff.

Trial by Jury Is Hereby Demanded.

[Endorsed]: Filed March 18, 1955. [14]

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[Title of District Court and Cause.]

ANSWER OF CARL HOEFLE AND DELMAR  
PORTER TO FIRST AMENDED COMPLAINT

Comes Now, the defendant Carl Hoefle and Delmar S. Porter, individually, and as copartners, doing business under the fictitious firm name and style of Tune Towne Tunes, and by way of answer to the first amended complaint hereinabove, admit, deny and allege as follows:

I.

Deny generally and specifically each and every allegation contained in Paragraph 2 thereof, and as to the allegation therein that plaintiff is and has been a citizen of the United States by virtue of the

fact that defendants have no knowledge or information sufficient to form a belief thereon, base their denial of the truth of said allegation, upon information and belief.

II.

Deny generally and specifically each and every allegation contained in Paragraph 4 thereof.

III.

Have no information or knowledge sufficient to form a belief [19] as to the allegations contained in Paragraph 5, and basing their denial thereon, deny generally and specifically each and every allegation therein contained.

IV.

Have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs 6 and 7, and basing their denial thereon, deny generally and specifically each and every allegation therein contained. Defendants further specifically deny that they or either of them have received any copies of plaintiff's musical compositions, and deny that the musical compositions entitled "Happy Pay Off Day" or "Blacksmith Blues" were copied whatsoever from plaintiff's copyrighted musical compositions.

V.

Refer to the allegations contained in Paragraph 8, and specifically deny that Exhibit III constitutes, or is an infringing composition, or that

the same infringes upon the musical compositions referred to therein as Exhibits I and II.

## VI.

Deny generally and specifically each and every allegation contained in Paragraphs 9 and 10 thereof, except that the defendants admit that they have caused to be published, sold, and marketed a musical composition entitled "Happy Pay Off Day" and "The Blacksmith Blues."

For a First Separate Defense, Said Defendants Allege:

### I.

That the complainant's alleged composition entitled "Good Old Army" and the version thereof known as "Waiting for My Baby," was neither new nor original with the complainant; that the alleged infringing portion, contains a beat, theme, and sequence of notes, and harmony, which has been used many times by others, prior to the time that complainant allegedly originated and composed the said alleged compositions or either of them, and that the basic melody, [20] beat, theme, and sequence of notes of complainant's alleged infringing portion was in the public domain, long prior to the time that the same was allegedly written and composed by the complainant.

By Way of Second Defense, Defendants Allege:

### I.

That there is no substantial similarity between the musical compositions set forth in Exhibits I,



II, and Exhibit III, nor does said Exhibit III contain a substantial or material portion of said Exhibits I and/or II.

## II.

That if there be any similarity of any unsubstantial or immaterial portion, the arrangement of the musical notes, are not only old, but have been used many times before. That there has been no original creation, by independent effort, by plaintiff of the alleged infringed portions of Exhibits I and II, in that the same has constituted the copying or imitation of the work of others.

## III.

That the complaint of plaintiff has been instituted without reasonable cause, and in bad faith, and has occasioned the need of these answering defendants to retain the services of Attorney Manuel Ruiz, Jr., to defend them legally, from said ill founded charges, so contained in plaintiff's petition.

By Way of Third Defense, Defendants Allege as Follows:

## I.

The claim set forth or attempted to be set forth in plaintiff's complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California.

By Way of Fourth Defense, Defendants Allege as Follows:

I.

Plaintiff has been guilty of laches with respect to asserting her claim in that the alleged infringing composition has for [21] a period of time both antecedent to, and since the statutory limitation period has been widely disseminated among musicians, arrangers, and publishers in the music industry, and otherwise, for good and valuable considerations exchanged and paid for in its commercial exploitation, in good faith, and it would now be manifestly unfair and contrary to equity, to require these answering defendants at this late date, to undo that which has been done in good faith and by reason thereof plaintiff should be denied any relief prayed for in plaintiff's said complaint on file herein.

Wherefore, the defendants demand judgment of dismissal, of the bill of complaint, for attorney's fees and a reasonable sum, for costs.

/s/ MANUEL RUIZ, JR.,

Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed April 11, 1955. [22]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS CAPITOL RECORDS, INC., AND CAPITOL RECORDS DISTRIBUTING CORP. TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendants, Capitol Records, Inc., a corporation, and Capitol Records Distributing Corp., a corporation, for themselves alone, admit, deny and allege, as follows:

I.

Answering paragraphs 2, 5 and 6 of plaintiff's first [24] amended complaint, the answering defendants deny that they received copies of the musical compositions referred to in said paragraphs 2, 5 and 6. Except as herein expressly denied, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 5 and 6 and, therefore, deny, generally and specifically, each and every allegation therein contained.

II.

Answering paragraph 4 of said complaint, the answering defendants deny, generally and specifically, each and every allegation therein contained.

III.

Answering paragraph 7 of said complaint, the answering defendants admit and allege as follows:

(1) Defendant Capitol Records, Inc., recorded and manufactured phonograph records of the performance of the musical composition "Happy Pay Off Day" by Mickey Katz, which phonograph record was distributed and sold by defendant Capitol Records Distributing Corp. Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Tune Towne Tunes.

(2) Defendant Capitol Records, Inc., recorded and manufactured phonograph records of the performance of the musical composition "The Blacksmith Blues," by Ella Mae Morse, which phonograph record was first released on or about January 7, 1952. Said phonograph record was distributed and sold by defendant Capitol Records Distributing Corp. Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Tune Towne Tunes.

(3) Defendant Capitol Records, Inc., recorded and manufactured phonograph records of the performance of the [25] musical composition "The Blacksmith Blues" by Eddie Bergman, which phonograph record was first released on or about December 1, 1952. Said record was distributed by defendant Capitol Records Distributing Corp. as part of its transcription service. Said recording, manufacture and distribution was done pursuant to a license granted by defendant Hill and Range Songs, Inc. These answering defendants expressly deny that by reason of the recording, manufacture, distribution and sale of said pho-

nograph records they thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said amended complaint and further deny that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin' for My Baby." Further answering said paragraph 7, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the alleged copyrights described in paragraph 5 of said complaint and, therefore, deny said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendants deny, generally and specifically, each and every allegation contained in said paragraph 7.

#### IV.

Answering paragraph 8 of said complaint, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, these answering [26] defendants admit that "Exhibit 3"



attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues," but deny that said musical composition infringes plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

## V.

Answering paragraph 9 of said complaint, these answering defendants admit and allege that defendant Capitol Records, Inc., received a letter from an attorney, George White, Esq., dated November 17, 1952, claiming that the musical composition "The Blacksmith Blues" infringed a musical composition composed by his client, Mildred Schultz, which claim was denied on behalf of defendant Capitol Records, Inc. Except as hereinabove expressly admitted and alleged, defendants deny, generally and specifically, each and every allegation contained in said paragraph 9.

## VI.

Answering paragraph 10 of plaintiff's complaint, these answering defendants admit and allege that the phonograph record of the performance of "The Blacksmith Blues," by Ella Mae Morse is still being manufactured by defendant Capitol Records, Inc., and distributed and sold by defendant Capitol Records Distributing Corp. Except as herein expressly admitted and alleged, defendants deny, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, These Answering Defendants Allege:

VII.

Plaintiff's first amended complaint fails to state a claim against these answering defendants upon which relief can be granted. [27]

For a Second Affirmative Defense, These Answering Defendants Allege:

VIII.

Plaintiff's first amended complaint fails to state a claim against these answering defendants within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, These Answering Defendants Allege:

IX.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, These Answering Defendants Allege:

X.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's

first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, These Answering Defendants Allege:

XI.

That there is no substantial similarity between the musical compositions set forth in "Exhibit 3" and the musical compositions set forth in "Exhibit 1" or "Exhibit 2," nor does said "Exhibit 3" contain a substantial or material portion of said "Exhibit 1" or "Exhibit 2." [28]

XII.

Insofar as any musical material in said composition "The Blacksmith Blues" or "Happy Pay Off Day" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin' for My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, These Answering Defendants Allege:

XIII.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin' for My Baby" has for many years been



and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have any exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, These Answering Defendants Allege:

XIV.

By reason of the matters and things set forth in paragraph XIII hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

For an Eighth Affirmative Defense, These Answering Defendants Allege:

XV.

That the commencement of the within action by plaintiff [29] has occasioned the need of the retention of the services of Manuel Ruiz, Jr., as an attorney to defend the within action on behalf of these answering defendants.

Wherefore, these answering defendants pray judgment that plaintiff take nothing by her first amended complaint and that the same be dismissed, that these answering defendants have and recover of plaintiff their attorney's fees in a reasonable sum and costs incurred herein, and for such other

and further relief as to the Court may seem proper and equitable in the premises.

/s/ MANUEL RUIZ, JR.,  
Attorney for Defendants Capitol Records, Inc., and  
Capitol Records Distributing Corp.

Duly verified.

[Endorsed]: Filed April 13, 1955. [30]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANTS HILL AND  
RANGE SONGS, INC., AND RUMBALERO  
MUSIC, INC., TO FIRST AMENDED COM-  
PLAINT

In answer to plaintiff's first amended complaint on file herein, defendants, Hill and Range Songs, Inc., a corporation, and Rumbalero Music, Inc., a corporation, for themselves alone, admit, deny and allege, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of [32] plaintiff's first amended complaint, the answering defendants deny that they received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, deny, gen-

erally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, these answering defendants admit and allege that subsequent to April 7, 1941, defendant Hill and Range Songs, Inc., published and marketed the musical composition "The Blacksmith Blues" previously known as "Happy Pay Off Day" and that defendant Rumbalero Music, Inc., licensed public performances for profit of said musical composition, but deny that they thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint and further deny that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition, entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, deny said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendants deny, generally and specifically, each and every allegation contained in said paragraph [33] 7.

## III.

Answering paragraph 8 of said complaint, these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, these answering defendants admit that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues" published, marketed and licensed by these answering defendants as admitted and alleged in paragraph II hereinabove, but deny that said musical composition infringes Plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

## IV.

Answering paragraph 9 of plaintiff's complaint, these answering defendants admit and allege that in 1952 they commenced receiving correspondence from George B. White, representing himself as plaintiff's attorney, asserting certain claims of infringement on behalf of plaintiff, which claims defendant's attorneys denied. Except as hereinabove expressly admitted and alleged, defendants deny, generally and specifically, each and every allegation contained in said paragraph 9.

## V.

Answering paragraph 10 of plaintiff's complaint, these answering defendants admit and allege that since on or about January, 1952, defendant Hill and



Range Songs, Inc., has published, sold and otherwise marketed, and defendant Rumbalero Music, Inc., has licensed the public performance for profit of said musical composition "The Blacksmith Blues." Except as herein expressly admitted and alleged, defendants deny, [34] generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, These Answering Defendants Allege:

VI.

Plaintiff's first amended complaint fails to state a claim against these answering defendants upon which relief can be granted.

For a Second Affirmative Defense, These Answering Defendants Allege:

VII.

Plaintiff's first amended complaint fails to state a claim against these answering defendants within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, These Answering Defendants Allege:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, These Answering Defendants Allege:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first [35] amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, These Answering Defendants Allege:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, These Answering Defendants Allege:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or

property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, These Answering Defendants Allege:

XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended [36] complaint, are void.

Wherefore, these answering defendants pray judgment that plaintiff take nothing by her complaint and that these answering defendants have and recover of plaintiff their attorney's fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,  
Attorneys for Defendants Hill and Range Songs,  
Inc., and Rumbalero Music, Inc.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed April 21, 1955. [37]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT BROADCAST  
MUSIC, INC., TO FIRST AMENDED COM-  
PLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Broadcast Music, Inc., a corporation, incorrectly sued herein as BMI Broadcast Music, Inc., for itself alone, admits, denies and alleges, as follows: [39]

I.

Answering paragraphs 2, 4, 5 and 6 of plaintiff's first amended complaint, this answering defendant denies that it received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation, therein contained.

II.

Answering paragraph 7 of said complaint, the answering defendant admits and alleges that, subsequent to April 7, 1941, defendant Broadcast Music, Inc., licensed the public performance for profit of the musical composition "The Blacksmith Blues," previously known as "Happy Pay Off Day." Said licenses were granted pursuant to an agreement with and authority from defendant Hill and Range



Songs, Inc. This answering defendant expressly denies that by reason of granting said licenses it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint, and further denies that the musical composition "The Blacksmith Blues," also known as "Happy Pay Off Day," was copied largely, or at all, from plaintiff's alleged copyright musical composition entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, [40] therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's com-

plaint is a copy of the said musical composition, "The Blacksmith Blues," but denies that said musical composition infringes Plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

#### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

#### V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that it is still licensing the public performance for profit of the said musical composition "The Blacksmith Blues." Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, This Answering Defendant Alleges: [41]

#### VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

#### VII.

Plaintiff's first amended complaint fails to state

a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant [42] Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composi-

tion "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

### XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

### XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its [43] attorney's fees and costs incurred herein, and for such other and further relief

as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant

Broadcast Music, Inc.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 16, 1955. [44]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT DECCA RECORDS, INC., TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Decca Records, Inc., a corporation, for itself alone, admits, denies and alleges, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of plaintiff's first amended complaint, this answering defendant denies [47] that it received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.



## II.

Answering paragraph 7 of said complaint, this answering defendant admits and alleges as follows:

1. Defendant Decca Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Sy Oliver, which phonograph recording was first released on or about February, 1952.

2. Defendant Decca Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Bill Barnell, which phonograph recording was first released on or about February, 1952.

Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint, and further denies that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition, entitled "Good Old Army" or from [48] the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth



of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues," but denies that said musical composition infringes plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

### V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that

the phonograph recording of the performance of "The Blacksmith Blues" [49] by Sy Oliver, and the phonograph recording of the performance of "The Blacksmith Blues" by Bill Barnell are still being manufactured, distributed and sold by Decca Records, Inc. Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, This Answering Defendant Alleges:

VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII.

Plaintiff's first amended complaint fails to state a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions

of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant [50] Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or

“Waitin For My Baby” has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges: [51]

## XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff’s alleged copyrights, referred to in paragraph 5 of plaintiff’s first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its attorney’s fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant,  
Decca Records, Inc.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 17, 1955. [52]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT LOEW'S INCORPORATED, INCORRECTLY SUED HEREIN AS MGM RECORD DISTRIBUTORS AND SERVED HEREIN AS DEFENDANT DOE I, TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Loew's Incorporated, a corporation, incorrectly sued herein as MGM Record Distributors and served herein as defendant "Doe I," for itself alone, admits, denies and alleges, as follows: [55]

I.

Answering paragraphs 2, 4, 5 and 6 of plaintiff's first amended complaint, this answering defendant denies that it received copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly denied, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

II.

Answering paragraph 7 of said complaint, the answering defendant admits and alleges that it recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Art Moo-



ney, which phonograph recording was first released on or about January, 1952. Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint and further denies that the musical composition "The Blacksmith Blues," also known as "Happy Pay Off Day," was copied largely, or at all, from plaintiff's alleged copyright musical composition entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and [56] to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth



of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition, "The Blacksmith Blues," but denies that said musical composition infringes plaintiff's "Exhibit 1" or "Exhibit 2" or any other musical composition.

#### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

#### V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that the phonograph recording of the performance of "The Blacksmith Blues" by Art Mooney is still being manufactured, distributed and sold by Loew's Incorporated. Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10. [57]

For a First Affirmative Defense, This Answering Defendant Alleges:

#### VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII.

Plaintiff's first amended complaint fails to state a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein. [58]

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this [59] answering defendant have and recover of plaintiff its attorney's fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant,  
Loew's Incorporated.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 19, 1955.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT RADIO CORPORATION OF AMERICA TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Radio Corporation of America, a corporation, for itself alone, admits, denies and alleges, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of said complaint, [62] this answering defendant alleges that it has no record of receiving copies of the musical

compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly alleged, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2, 4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, this answering defendant admits and alleges as follows:

1. Defendant Radio Corporation of America recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Elton Britt, which phonograph recording was first released on or about February, 1952.

2. Defendant Radio Corporation of America recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Ralph Flanagan, which phonograph recording was first released on or about May, 1952.

Said recording, manufacture, distribution and sale was done pursuant to a license granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint, and further denies that the



musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged [63] copyright musical composition, entitled "Good Old Army" or from the copyright further version thereof entitled "Waitin For My Baby." Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that "Exhibit 1" or "Exhibit 2" attached to plaintiff's complaint are copies of plaintiff's alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that "Exhibit 3" attached to plaintiff's complaint is a copy of the said musical composition "The Blacksmith Blues," but denies that said musical composition infringes plaintiff's



“Exhibit 1” or “Exhibit 2” or any other musical composition.

IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.

V.

Answering paragraph 10 of plaintiff's complaint, this answering defendant admits and alleges that the phonograph [64] recording of the performance of “The Blacksmith Blues” by Ralph Flanagan, and the phonograph recording of the performance of “The Blacksmith Blues” by Elton Britt are still being manufactured, distributed and sold by Radio Corporation of America. Except as herein expressly admitted and alleged, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 10.

For a First Affirmative Defense, This Answering Defendant Alleges:

VI.

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII.

Plaintiff's first amended complaint fails to state a claim against this answering defendant within

the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

### VIII.

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California. [65]

For a Fourth Affirmative Defense, This Answering Defendant Alleges:

### IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

### X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical com-

position "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or "Waitin For My Baby" has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

XII.

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff's alleged copyrights, referred to in paragraph 5 of plaintiff's first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its attorney's fees and costs incurred herein, and for such other and further relief as to

the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant Radio  
Corporation of America.

Duly Verified.

Affidavit of servie by mail attached.

[Endorsed]: Filed May 24, 1955. [67]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT COLUMBIA RECORDS, INC., TO FIRST AMENDED COMPLAINT

In answer to plaintiff's first amended complaint on file herein, defendant, Columbia Records, Inc., a corporation, for itself alone, admits, denies and alleges, as follows:

I.

Answering paragraphs 2, 4, 5 and 6 of said complaint, this answering defendant alleges that it has no record of receiving copies of the musical compositions referred to in said paragraphs 2, 4, 5 and 6. Except as herein expressly alleged, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the balance of the allegations contained in said paragraphs 2,

4, 5 and 6 and, therefore, denies, generally and specifically, each and every allegation therein contained.

## II.

Answering paragraph 7 of said complaint, the answering defendant admits and alleges as follows:

1. Defendant Columbia Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Harry James and Tony Harper, which phonograph recording was first released on or about February, 1952.

2. Defendant Columbia Records, Inc., recorded, manufactured, distributed and sold phonograph records of the performance of the musical composition "The Blacksmith Blues" by Leon McAuliffe, which phonograph recording was first released on or about February, 1952.

Said recording, manufacture, distribution and sale was done pursuant to licenses granted by defendant Hill and Range Songs, Inc. This answering defendant expressly denies that by reason of the recording, manufacture, distribution and sale of said phonograph records, it thereby infringed plaintiff's alleged copyrights referred to in paragraph 5 of said complaint and further denies that the musical composition "The Blacksmith Blues" also known as "Happy Pay Off Day" was copied largely, or at all, from plaintiff's alleged copyright musical composition, entitled, "Good Old Army" or from the copyright further version thereof entitled "Waitin For



My Baby.” Further answering said paragraph 7, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that, since April 7, 1941, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyrights described in paragraph 5 of said complaint and, therefore, denies said allegation. Except as herein expressly admitted and alleged, and except as to the allegations herein denied for lack of information and belief, defendant denies, generally and specifically, each and every allegation contained in said paragraph 7.

### III.

Answering paragraph 8 of said complaint, this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that “Exhibit 1” or “Exhibit 2” attached to plaintiff’s complaint are copies of plaintiff’s alleged copyrighted musical composition. Further answering said paragraph 8, this answering defendant admits that “Exhibit 3” attached to plaintiff’s complaint is a copy of the said musical composition, “The Blacksmith Blues,” but denies that said musical composition infringes plaintiff’s “Exhibit 1” or “Exhibit 2” or any other musical composition.

### IV.

Answering paragraph 9 of said complaint, this answering defendant denies, generally and specifically, each and every allegation contained in said paragraph 9.



V.

Answering paragraph 10 of said complaint, this answering defendant admits and alleges that, on or about June, 1953, it discontinued the manufacture, distribution and sale of the phonograph recording of the performance of "The Blacksmith Blues" by Harry James and Tony Harper; that, on or about April, 1954, it discontinued the manufacture, distribution and sale of the phonograph recording of the performance of "The Blacksmith Blues" by Leon McAuliffe.

For a First Affirmative Defense, This Answering Defendant Alleges:

VI

Plaintiff's first amended complaint fails to state a claim against this answering defendant upon which relief can be granted.

For a Second Affirmative Defense, This Answering Defendant Alleges:

VII

Plaintiff's first amended complaint fails to state a claim against this answering defendant within the jurisdiction of the United States District Courts.

For a Third Affirmative Defense, This Answering Defendant Alleges:

VIII

The claim set forth or attempted to be set forth in plaintiff's first amended complaint, and each and

every part thereof, is barred by the provisions of Section 339, subdivision (1) of the Code of Civil Procedure of the State of California, or by Section 340, subdivision (3) of the Code of Civil Procedure of the State of California.

For a Fourth Affirmative Defense, This Answering Defendant [73] Alleges:

IX.

Plaintiff has been guilty of laches with respect to asserting her alleged claim set forth in plaintiff's first amended complaint and with respect to commencing this action and by reason thereof should be denied any relief prayed for in plaintiff's said complaint on file herein.

For a Fifth Affirmative Defense, This Answering Defendant Alleges:

X.

Insofar as any musical material in said composition "The Blacksmith Blues" may have or bear any point of resemblance to plaintiff's musical composition "Good Old Army" or "Waitin For My Baby," such musical material is in the public domain and was not copied or prepared from plaintiff's alleged musical composition.

For a Sixth Affirmative Defense, This Answering Defendant Alleges:

XI.

That the musical material contained in plaintiff's alleged musical compositions "Good Old Army" or

“Waitin For My Baby” has for many years been and now is in the public domain, and is not subject to copyright registration or to exclusive appropriation of any person or persons whatsoever, and that plaintiff has not and cannot have exclusive right or property right whatsoever, or exclusive title or interest in the same, or any part thereof.

For a Seventh Affirmative Defense, This Answering Defendant Alleges:

## XII

By reason of the matters and things set forth in paragraph XI hereinabove, plaintiff’s alleged copyrights, referred to in paragraph 5 of plaintiff’s first amended complaint, are void.

Wherefore, this answering defendant prays judgment that plaintiff take nothing by her complaint and that this answering defendant have and recover of plaintiff its attorney’s fees and costs incurred herein, and for such other and further relief as to the Court may seem proper and equitable in the premises.

GANG, KOPP & TYRE,

By /s/ MILTON A. RUDIN,

Attorneys for Defendant,  
Columbia Records, Inc.

Duly Verified.

Affidavit of service by mail attached.

[Endorsed]: Filed May 25, 1955. [75]

In the United States District Court, Southern  
District of California, Central Division

No. 17261-TC Civil

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES, CHARLES DOUGLAS HONE,  
LINDLEY A. JONES, CARL HOFFLE and  
DELMAR S. PORTER, Copartners, Individu-  
ally and as Copartners, Doing Business Under  
the Fictitious Firm Name and Style of TUNE  
TOWNE TUNES; HILL AND RANGE  
SONGS, INC., a Corporation; CAPITOL  
RECORDS, INC., a Corporation; CAPITOL  
RECORDS DISTRIBUTION CORPORA-  
TION, a Corporation; RUMBALERO MUSIC,  
INC., a Corporation; BMI BROADCAST  
MUSIC, INC., a Corporation; COLUMBIA  
RECORDS, INC., a Corporation; DECCA  
RECORDS, INC., a Corporation; RADIO  
CORPORATION OF AMERICA, a Corpora-  
tion; MGM RECORD DISTRIBUTORS,

Defendants.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for  
trial before Honorable Thurmond Clarke, Judge,  
on the 17th day of September, 1957, and having been

tried on said date, and on September 18 and 19, 1957, plaintiff appearing by Thomas P. Mahoney and Carl Hoppe, by Carl Hoppe, Esq.; defendants Jack Holmes, Charles Douglas Hone, Lindley A. Jones, Carl Hoefler, and Delmar S. Porter, individually and as copartners doing business under the fictitious firm name and style of Tune Towne Tunes; Capitol Records, Inc., and Capitol Records Distributing Corporation, appearing by Manuel Ruiz, Jr., Esq.; and defendants Hill and Range Songs, Inc.; Rumbalero Music, Inc.; BMI Broadcast Music, Inc.; Columbia Records, Inc.; Decca Records, Inc.; Radio Corporation of America, and Loew's Incorporated (herein sued as MGM Record Distributors) appearing by Gang, Kopp & Tyre by Milton A. Rudin, Esq., and Payson Wolff, Esq.; and plaintiff in open court having dismissed said action as to defendant Jack Holmes; and the issue of damages, if any and the computation thereof, having been deferred by stipulation to a determination of the liability, if any, of defendants; and evidence having been introduced on behalf of all parties, and briefs having been submitted on behalf of all parties and the cause having been finally submitted to the court for decision, the court, being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law, as follows:

### Findings of Fact

1. Plaintiff, at all times pertinent herein, was, and now is, a citizen of the United States of America.



2. Prior to April 7, 1941, plaintiff composed the words and music of a musical composition entitled "Good Old Army" and subsequently applied for and received from the United States Register of Copyrights a certificate of copyright (unpublished) on said composition, bearing No. E 254497, dated April 7, 1951.

3. Prior to July 7, 1949, plaintiff adapted the music of said "Good Old Army," composed different words, and entitled the words and music of said musical composition "Waitin' For My Baby," and subsequently applied for and received from the United States Register of Copyrights a [80] certificate of copyright (unpublished) on said composition bearing No. E 172341, dated July 7, 1949.

4. Plaintiff is sole and exclusive owner of said compositions, "Good Old Army" and "Waitin' For My Baby", insofar as said compositions may be subject to exclusive ownership, as hereinafter provided.

5. Jack Holmes composed the words and music of the original musical compositions entitled "Happy Pay Off Day" and "The Blacksmith Blues." Certificates of copyright on said "Happy Pay Off Day" and "The Blacksmith Blues" were applied for and issued by the United States Register of Copyrights.

6. Defendants herein, other than Jack Holmes, originally named as defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said "Happy Pay Off Day" and "The Blacksmith Blues".



7. Plaintiff heard a rendition of "The Blacksmith Blues" performed on the Sid Caesar television program by the Bob Hamilton trio, over Station KRON-TV, San Francisco, on March 1, 1952.

8. "The Blacksmith Blues" was performed on the program "Your Hit Parade" over Station KRON-TV, San Francisco, on the following dates in the year 1952: April 19, April 26, May 3, May 10, May 17, May 24, May 31, June 7 and June 14. Plaintiff heard one or more of the aforesaid performances.

9. During November, 1952, plaintiff caused her then attorney, George B. White, Esq., to write to some of the defendants herein, asserting that defendants' compositions infringed upon those of plaintiff. Although definitively advised as early as April 20, 1953, by attorneys for some defendants that defendants' compositions were not infringements of those of plaintiff, plaintiff did not cause the within action to be filed until April 29, 1954, or more than two years after plaintiff's discovery of the existence of defendants' compositions.

10. Plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid.

11. It is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either

of them, or in any other way were aware of the existence of plaintiff's composition prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid.

12. The first measure of "Happy Pay Off Day" and of "The Blacksmith Blues" utilizes some notes in common with the notes of the opening measures of "Good Old Army" and "Waitin' For My Baby"; insofar as such musical material in "Happy Pay Off Day" and "The Blacksmith Blues" bears any similarity to "Good Old Army" or "Waitin' For My Baby," such musical material was not copied or prepared from plaintiff's compositions. The common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill.

13. There are differences in the first measure of "Happy Pay Off Day" and "The Blacksmith Blues," compared to the corresponding measures of "Good Old Army" and "Waitin' For My Baby"; these differences are apparent in each instance in which the musical material contained in said first measures appears elsewhere in said musical compositions. Among these differences are the use of a different passing tone between the mi and sol components of the triad upon which said first measures are constructed, and the fact that plaintiff's compositions contain a rest on the last half

of the final count of their respective first measures whereas Jack Holmes' compositions do not.

14. Because of these differences, the first measures of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression.

15. The construction, modulations, phrasing, musical notes, and other musical material contained in "Happy Pay Off Day" and "The Blacksmith Blues" are not similar to that of "Good Old Army" and "Waitin' For My Baby."

16. A performance of either "Good Old Army" or "Waitin' For My Baby" does not convey or give an impression to the average listener, of similarity or resemblance to "Happy Pay Off Day" or "The Blacksmith Blues," in any particular or taken as a whole.

17. Neither all of "Happy Pay Off Day" or "The Blacksmith Blues," nor any part thereof, was copied or prepared from [83] "Good Old Army" or "Waitin' For My Baby," or any part thereof.

18. It is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in "Happy Pay Off Day" or "The Blacksmith Blues" by the publishing, selling, and otherwise marketing of said compositions.

## Conclusions of Law

## I.

The Court has jurisdiction over this cause pursuant to the provisions of Title 28, United States States Code, section 1338. [84]

## II.

Neither of the compositions, "Happy Pay Off Day" nor "The Blacksmith Blues," are infringements upon plaintiff's compositions "Good Old Army" or "Waitin' For My Baby."

## III.

Defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, "Happy Pay Off Day" and "The Blacksmith Blues."

## IV.

Defendants are entitled to judgment herein for their costs of suit incurred herein.

Let Judgment be entered accordingly.

Dated: January 8, 1958.

/s/ THURMOND CLARKE,  
United States District Judge.

Affidavit of service by mail attached.

Lodged December 26, 1957.

[Endorsed]: Filed January 8, 1958. [85]

In the United States District Court, Southern  
District of California, Central Division

No. 17261-TC Civil

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES, CHARLES DOUGLAS HONE,  
LINDLEY A. JONES, CARL HOEFLE and  
DELMAR S. PORTER, Copartners, Individu-  
ally and as Copartners, Doing Business Under  
the Fictitious Firm Name and Style of TUNE  
TOWNE TUNES; HILL AND RANGE  
SONGS, INC., a Corporation; CAPITOL  
RECORDS, INC., a Corporation; CAPITOL  
RECORDS DISTRIBUTING CORPORA-  
TION, a Corporation; RUMBALERO MU-  
SIC, INC., a Corporation; BMI BROAD-  
CAST MUSIC, INC., a Corporation; CO-  
LUMBIA RECORDS, INC., a Corporation;  
DECCA RECORDS, INC., a Corporation;  
RADIO CORPORATION OF AMERICA, a  
Corporation; MGM RECORD DISTRIBUTU-  
TORS,

Defendants.

### JUDGMENT

The above-entitled action came on regularly for  
trial before Honorable Thurmond Clarke, Judge,  
on the 17th day of September, 1957, and having  
been tried on said date, and on September 18 and



19, 1957, plaintiff appearing by Thomas P. Mahoney and Carl Hoppe, by Carl Hoppe, Esq.; defendants Jack Holmes, Charles Douglas Hone, Lindley A. Jones, Carl Hoefler, [87] and Delmar S. Porter, individually and as copartners doing business under the fictitious firm name and style of Tune Towne Tunes; Capitol Records, Inc. and Capitol Records Distributing Corporation, appearing by Manuel Ruiz, Jr., Esq.; and defendants Hill and Range Songs, Inc., Rumbalero Music, Inc., BMI Broadcast Music, Inc., Columbia Records, Inc., Decca Records, Inc., Radio Corporation of America, and Loew's Incorporated (herein sued as MGM Record Distributors) appearing by Gang, Kopp & Tyre by Milton A. Rudin, Esq. and Payson Wolff, Esq.; and plaintiff in open court having dismissed said action as to defendant Jack Holmes; and the cause having been tried by the Court, and evidence having been introduced on behalf of all parties, and briefs having been submitted on behalf of all parties, and the cause having been finally submitted to the Court for decision, and the Court being fully advised in the premises, and having heretofore made and filed its written Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

### I.

That plaintiff, Mildred Becker Schultz, take nothing by her amended Complaint herein.

II.

That defendants Jack Holmes, Charles Douglas Hone, Lindley A. Jones, Carl Hoefler, and Delmar S. Porter, individually and as copartners doing business under the fictitious firm name and style of Tune Towne Tunes; Capitol Records, Inc. and Capitol Records Distributing Corporation, have judgment for their costs of suit in the amount of \$. . . . . [88]

III.

That defendants Hill and Range Songs, Inc., Rumbalero Music, Inc., BMI Broadcast Music, Inc., Columbia Records, Inc., Decca Records, Inc., Radio Corporation of America, and Loew's Incorporated (herein sued as MGM Record Distributors), have judgment for their costs of suit in the amount of \$125.94.

IV.

The Clerk is ordered to enter this Judgment forthwith.

Dated: January 8, 1958.

/s/ THURMOND CLARKE,  
United States District Judge.

Lodged: December 26, 1957.

[Endorsed]: Filed and entered January 8, 1958.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Mildred Becker Schultz, plaintiff in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 8, 1958.

MILDRED BECKER  
SCHULTZ,

By /s/ CARL HOPPE,  
One of Her Attorneys.

[Endorsed]: Filed February 6, 1958. [109]

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In the United States District Court, Southern  
District of California, Central Division

No. 17261-TC Civil

MILDRED BECKER SCHULTZ,

Plaintiff,

vs.

JACK HOLMES, CHARLES DOUGLAS HONE,  
LINDLEY A. JONES, CARL HOEFLE and  
DELMAR S. PORTER, Copartners, Individu-  
ally and as Copartners, Doing Business Under  
the Fictitious Firm Name and Style of TUNE  
TOWNE TUNES, HILL AND RANGE  
SONGS, INC., a Corporation; CAPITOL  
RECORDS, INC., a Corporation; CAPITOL

RECORDS DISTRIBUTING CORPORATION, a Corporation; RUMBALERO MUSIC, INC., a Corporation; BMI BROADCAST MUSIC, INC., a Corporation; COLUMBIA RECORDS, INC., a Corporation; DECCA RECORDS, INC., a Corporation; RADIO CORPORATION OF AMERICA, a Corporation; MGM RECORD DISTRIBUTORS,

Defendants.

Honorable Thurmond Clarke, Judge, presiding.

REPORTER'S TRANSCRIPT  
OF PROCEEDINGS

Tuesday, September 17, 1957, 10 A.M.

The Clerk: Case No. 17,261-TC Civil, Schultz vs. Holmes, et al., for trial.

The Court: Where is Mr. Mahoney?

Mr. Hoppe: Mr. Mahoney won't be here this morning, your Honor.

The Court: Oh, I see.

Mr. Hoppe: I am Carl Hoppe from San Francisco.

Mr. Ruiz: I don't see either Mr. Rudin or Mr. Wolff either. Mr. Wolff is associated with Mr. Rudin.

The Court: We will go ahead and proceed. This Court runs on time, just like the Santa Fe Super Chief. If they are here, all right, and if they are not, all right. Go ahead and make your statement.

OPENING STATEMENT ON BEHALF  
OF PLAINTIFF

By Mr. Hoppe:

May it please the Court:

This is a copyright infringement suit, involving musical copyright.

The Court: Yes.

Mr. Hoppe: The plaintiff is Mildred Becker and she wrote two songs which were Copyrighted. One of them was "Good Old Army" and the other one was "Waitin' for My Baby." These two songs have the same musical theme in them, and it [6\*] is the musical theme with which we are concerned rather than the title to the music or the words of the music.

The Copyrights were obtained, in 1941 for "Good Old Army" and in 1949, for "Waitin' For My Baby."

In 1950, a man by the name of Jack Holmes, also known as Hone, wrote two pieces of music, using what we say is the same theme, the same musical theme. One of the songs is "Happy Pay Day" or "Happy Pay Off Day" and the other one is "The Blacksmith Blues."

The theme became what you and I would call a best seller, and the plaintiff, Mrs. Schultz, who had been Miss Becker at the time she got her Copyrights, heard the theme on the TV, gave notice to the several defendants and filed this suit.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



This suit has been pending, as your Honor is aware of, for a number of years.

One of the things we have to prove, will of course be originality. Another thing we will have to prove will be infringement.

Now, infringement in a copyright suit is somewhat different than it is in a patent infringement suit. We have to show not only similarity to make infringement, but we have to show copying.

Now, so far as the similarity is concerned, I think that as the evidence unfolds and you will hear the two [7] pieces of music, there will be no doubt in your Honor's mind but that the two pieces of music are, well, what I would say the same so far as the theme is concerned.

We have a more difficult problem on the question of access. We have no direct evidence that Jack Holmes, the recorded author of "The Blacksmith Blues" and "Happy Pay Day" or "Happy Pay Off Day" ever actually saw or heard Mrs. Schultz's music. However, we have good circumstantial evidence. The circumstances are as follows:

Mrs. Schultz, when she was Miss Becker, plugged this song substantially up and down the Coast, in San Francisco and also in Los Angeles.

Mr. Ruiz: What was that word, counsel? I didn't hear that.

Mr. Hoppe: Plugged.

The Court: Plugged.

We are just having the opening statement, Mr. Wolff.

Mr. Wolff: Thank you, your Honor. Mr. Rudin will be here in just a moment.

The Court: All right.

Mr. Wolff: Judge Hall has him on the "carpet" in there.

The Court: Yes, I know.

Mr. Wolff: He will be here shortly.

The Court: Go right ahead [8]

Mr. Hoppe: And then there is such an unusual similarity between the unique theme of my client's music and the theme of "Blacksmith Blues" and "Happy Pay Off Day" or "Happy Pay Day" that we will ask the Court to draw the inference that there must have been access, because otherwise, this remarkable similarity couldn't have come about, sort of the application of the *res ipsa loquitur* rule of ordinary torts to this copyright case.

Now, in the pleadings we ask for the defendants to account for the number of pieces of music they have produced.

So we intend to put in no direct evidence, at this time, as to the extent of damages and ask the Court to set that down for special hearing in the event that there is a determination that there is liability. That is quite common in cases of this type.

The Court: Yes, that is right.

Mr. Hoppe: And I think it is better than to encumber the record as to a lot of damages if there aren't any damages.

The Court: That is right. I agree with you.

Mr. Hoppe: Now, if the defendants care to make a statement, I will wait for them.

The Court: Mr. Ruiz is here. Do you want to make a statement?

The Clerk: Mr. Wolff is here. Mr. Rudin is still in [9] another Court.

OPENING STATEMENT ON BEHALF  
OF CERTAIN DEFENDANTS

By Mr. Ruiz:

There are numerous defendants, your Honor, and I represent the defendants Carl Hoeffle and Delmar S. Porter——

The Court: Yes; I have that.

Mr. Ruiz: ——doing business as Tune Towne Tunes; Capitol Records, Inc., and Capitol Records Distributing Corporation.

Jack Holmes, Charles Douglas Hone, has never been served in this action, as a consequence of which I would like at this time to make a motion for dismissal.

The Court: All right; I will grant it.

Mr. Hoppe: He is dead, your Honor.

Mr. Ruiz: There was an estate at the time.

The Court: All right. We will grant that motion.

Mr. Ruiz: I think the evidence will show that there is no originality whatsoever in the unpublished copyrighted songs known as “Good Old Army” and “Waitin’ For My Baby.”

Counsel says that he has no direct evidence that the decedent, Jack Holmes, ever saw or heard the melody and I am almost inclined to, on the opening

statement, make a motion to dismiss the entire case, because counsel has stated that it is a necessary element to prove that there must have been access and he is going to ask this Court to draw some sort of an inference based upon what is called a [10] unique theme.

The Court will have an opportunity to hear all of the songs involved. There are four in number. The first one, which is "Good Old Army," was purportedly conceived at about the time of the beginning of the War, and later on, some nine years later, that was changed by the plaintiff with respect to the title and called "Waitin' For My Baby."

With respect to the so-called infringing songs, there are two in number. The first one is "Happy Pay Off Day," which was subsequently changed in so far as title is concerned, to "Blacksmith Blues."

I believe that the evidence will show that these pieces have around 32 bars in substance and that out of those 32 bars there is a remote similarity with respect to only 7 notes and that is all.

The Court: All right. Do you want to make a statement, Mr. Wolff?

Mr. Wolff: I am sorry, your Honor, that I didn't hear the entire statement of counsel.

The Court: He was just reviewing what he wanted to prove. I was just trying to use the Court's time.

Mr. Wolff: I appreciate that, your Honor. I think I will forego an opening statement at this time.

The Court: What will we do about Mr. Rudin? Is he down [11] the hall?

Mr. Wolff: He is just on a matter of pleading in a criminal matter and I don't believe it will take more than a minute or two. If your Honor wishes, I will be glad to go down there and check?

The Court: Go down and find out. Tell him I am just sitting here ready to start.

(A short intermission.)

The Court: We understood, Mr. Rudin, that you were occupied down the hall on an indigent panel appointment?

Mr. Rudin: I am sorry. I couldn't help it.

The Court: Well, we understand.

Mr. Rudin: Your Honor, we were appointed by Judge Hall.

The Court: All right. Do you want to make a statement at all, Mr. Rudin? They just reviewed the facts.

Mr. Rudin: No. I think we might as well start.

The Court: All right. You may call your first witness.

(Whereupon, the Plaintiff, to maintain the issues on her behalf, offered and introduced the following evidence, to wit:)

Mr. Hoppe: Mrs. Schultz. [12]



## MILDRED BECKER SCHULTZ

the plaintiff herein, called as a witness on her own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

A. Mildred Becker Schultz.

Mr. Hoppe: Your Honor, the witness is the plaintiff in this case, but before examining her I would like to identify the documentary and physical exhibits that we will use during the course of her examination.

As Plaintiff's Exhibit No. 1, we offer in evidence the Certificate of Copyright Registration, Class E unpublished, No. 254497, dated April 7, 1941, covering the title of the words and music to "Good Old Army."

As Plaintiff's Exhibit 2—

Mr. Rudin: May we see that, counsel?

Mr. Hoppe: Yes.

Mr. Rudin: Is this all you are offering, counsel?

Mr. Hoppe: That is Plaintiff's Exhibit 1.

Mr. Rudin: Well, do you have the—

Mr. Hoppe: Now, if you will wait until we are through, counsel. There are separate pages, counsel.

Mr. Rudin: All right.

Mr. Hoppe: As Plaintiff's Exhibit 2 we offer in evidence a copy of the words and music, "Good Old Army," bearing the Deposit stamp, Copyright Deposit, Library of Congress, United [13] States of America, and bearing the notation E unpublished 254497, which exhibit is presently attached to the

(Testimony of Mildred Becker Schultz.)

Amended Complaint filed on March 18, 1955, as Exhibit 1.

That, counsel, is one that goes with the one I have just handed to you.

Mr. Rudin: Yes.

Mr. Hoppe: As Plaintiff's Exhibit 3, we ask the clerk to mark for identification at this time, and we do not offer it, the piece of sheet music entitled "Good Old Army," which is a 4-piece document.

Mr. Rudin: That is for identification?

Mr. Hoppe: That is for identification only.

(Said document was marked as Plaintiff's Exhibit 3 for identification.)

Mr. Hoppe: As Plaintiff's Exhibit 4, we offer in evidence Certificate of Registration of Claim to Copyright in a Musical Composition No. E unpublished 172341.

As Exhibit 5, we offer in evidence the sheet music "Waitin' For My Baby," bearing the Copyright stamp "Copyright Deposit Library of Congress United States of America" and the notation E unpublished 172341.

As Exhibit 6, we wish to have marked for identification, but we do not offer in evidence, a four-page piece of sheet music entitled "Waitin' For My Baby."

(Said document was marked as Plaintiff's Exhibit 6, for identification.) [14]

Mr. Hoppe: As Exhibit 7, we ask the clerk to mark for identification, but we do not offer in evi-

(Testimony of Mildred Becker Schultz.)

dence, a photostatic copy of Exhibit 6 for identification.

(Said document was marked as Plaintiff's Exhibit 7, for identification.)

Mr. Wolff: Counsel, may we understand, as between 6 and 7, what is the difference?

Mr. Hoppe: That (indicating) is the original and this (indicating) is a photostat.

Mr. Wolff: Of the same thing?

Mr. Hoppe: Of the same thing.

As Exhibit 8, we offer in evidence a piece of sheet music entitled "The Blacksmith Blues" published by Hill and Range Songs, Inc., and having a picture of Ella Mae Morse on the front. That is an alleged infringing publication, your Honor.

As Plaintiff's Exhibit 9, we offer in evidence the alleged infringing publication "Happy Pay Off Day," Capital record, No. 5576-Y, by Mickey Katz and his Orchestra.

As Exhibit 10, we offer in evidence another alleged infringing publication, a Decca record No. 27045, entitled "Happy Pay Day" by Sonny Burke and his Orchestra.

As Plaintiff's Exhibit 11, we offer in evidence another alleged infringing publication, a Capitol record, No. 1693, [15] entitled "The Blacksmith Blues" by Ella Mae Morse, the singer, with Orchestra Conducted by Nelson Riddle.

Mr. Ruiz: Counsel, for the purpose of my record, will you tell us which exhibits are marked for identification on your list there?

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: Exhibits 3, 6 and 7 are for identification.

Mr. Ruiz: Three, 6 and 7. And the balance are offered?

Mr. Hoppe: The balance are offered.

Mr. Wolff: We have no objection to any of these items, except 3, 6 and 7 which are at this time I understand only offered for identification.

Mr. Hoppe: That is right.

Mr. Ruiz: On behalf of my clients, I understand that Exhibit No. 1, which was originally offered, indicates that the melody was copyrighted, is that correct, counsel?

Mr. Hoppe: Yes, words and melody.

Mr. Ruiz: Words and melody. Therefore, I object to any introduction into evidence of anything other than the melody, and more specifically the portion of the sheet music "Blacksmith Blues" that excludes the melody, that is to say, other than the melody, the base, etc., the chords, etc.

I object to Exhibit 9 being introduced into evidence, being a record of Mickey Katz and his Orchestra.

I don't know how we are going to be able to dissect the melody from the balance of the composition, if it is to be [16] played. Nevertheless, it will be important in this case. Therefore, I object to it. It is not Copyrighted and it is not intended to be a portion of this case.

I object to the Exhibit 10, being offered in evidence because that likewise is a record which has

(Testimony of Mildred Becker Schultz.)

other matters concerning chords, other than the melody.

And I object to Exhibit 11, the Capitol record, likewise, because, as I understand, we are concerned here only with a theme, as indicated by counsel in his opening statement, which is a melody, and the Copyrighted matter which the plaintiff is seeking protection on before this court has to do only with a melody; and for that reason I object to the introduction of anything but the melody as Copyrighted in this case.

Mr. Hoppe: Your Honor, we can't take the melody off of the records.

The Court: I will overrule the objection. They will be received. They will all be received.

The Clerk: Those will be Plaintiff's Exhibits 1, 2, 4, 5, 8, 9, 10 and 11 in evidence.

(Said documents and records were received in evidence as Plaintiff's Exhibits 1, 2, 4, 5, 8, 9, 10 and 11.)

#### Direct Examination

By Mr. Hoppe:

Q. Would you please state your name, Mrs. [17] Schultz? A. Mildred Becker Schultz.

Q. And Becker is your maiden name?

A. Yes, sir; it is.

Q. Where do you live, Mrs. Schultz?

A. At 2325 Casa Bona Avenue, Belmont, California.



(Testimony of Mildred Becker Schultz.)

Mr. Wolff: Will you talk a little louder, Mrs. Schultz, please?

The Witness: All right.

Q. (By Mr. Hoppe): Mrs. Schultz, have you ever been a witness in a lawsuit before?

A. No, sir.

Q. How old are you, Mrs. Schultz?

A. I am 37.

Q. And you are the plaintiff in this action?

A. Yes, sir.

Mr. Hoppe: May I approach the witness, your Honor?

The Court: That is all right; any time.

Q. (By Mr. Hoppe): Mrs. Schultz, I show you a document which is in evidence as Plaintiff's Exhibit 2, and ask you if you recognize it?

A. Yes, sir; I do.

Q. What is Plaintiff's Exhibit 2?

A. It is a copy of the original manuscript that I sent into Washington to have Copyrighted. It is a photostatic copy. [18]

Q. And what is shown on Plaintiff's Exhibit 2?

A. A seal from the Library of Congress.

Q. No. What is that representation? Is it music and words?

A. Yes, sir; it is. It is the music and words.

Q. To what song? A. "Good Old Army."

Q. And who wrote "Good Old Army"?

A. I wrote "Good Old Army."

Q. When did you write "Good Old Army"?

A. In 1941.

(Testimony of Mildred Becker Schultz.)

Q. Would you tell us how you composed the piece?

A. I was walking uptown in Redwood City with a girl friend and we ran into a friend of ours who was either drafted or enlisted in the Army, and we asked him how he liked the Army and he returned, he said, "I love it."

After leaving this friend and continuing my walk uptown, the words started running through my head, "Work-in' for the Army, Slavin' for the Army! Breakin' my back, I ain't gettin' no Jack, but I love it," and that is the way that song came to me, while I was walking.

Q. How did the melody come to you?

A. Well, it was or less the way I was walking, as I walked, the beat of my walk, and with the words running through my head. That is the way it came to me. [19]

Mr. Hoppe: Mrs. Schultz, since we can't indicate music to lay ears very easily, I wonder if it would be proper for her to hum the tune to us?

The Court: Oh, yes; certainly.

Q. (By Mr. Hoppe): Would you hum to us, the melody?

The Witness: Can I say the tune?

Mr. Hoppe: Yes, if you will.

A. (Humming): "Work-in for the Ar-my, slav-in for the Ar-my! Breakin' my back, I ain't get-tin' no Jack, but I love," Love "It; yes, I love it; marchin' a-long, sing-in' a song, to-tin a gun, always be-in' on the run for the Ar-my, good old

(Testimony of Mildred Becker Schultz.)

Ar-my, oh many people thing its rough, many people think its tough, they ain't rib-bin', they're not kiddin,' they're just fool-in themselves—be-in' a soldier, tak-in' the or-ders al-ways with a smile, while I'm walkin' those miles for the Ar-my, that good old a—my, -my!"

Mr. Wolff: If your Honor please, I must object to the plaintiff's rendition of her own composition. on the ground that she did not faithfully reproduce the notes that are written on the page.

The Court: Well, I think it is for the purpose of illustration. I think with that I will overrule the objection. [20]

Q. (By Mr. Hoppe): Now, Mrs. Schultz, after you obtained your Copyright, Plaintiff's Exhibit 1, of the music which is in evidence as Plaintiff's Exhibit 2, what did you do with the song, "Good Old Army"?

The Witness: I beg your pardon, sir. Did you say after it was Copyrighted?

Q. (By Mr. Hoppe): Yes.

The Witness: What is the next step I took?

Q. (By Mr. Hoppe): What did you do with the music and melody?

A. Well, I went downtown to the Union Music House to see if I could have an arrangement made. I tried to write an arrangement myself, but it didn't work out; I don't know enough about music. I went down and I was sent to a Mr. Frank Fuller, a professional arranger, who wrote me out a piano arrangement of it.

(Testimony of Mildred Becker Schultz.)

Q. Would you state what Plaintiff's Exhibit 3 is?

A. It is a printed copy of the original manuscript that Mr. Fuller wrote for me. It is in his handwriting.

Q. And is this what you call the piano arrangement? A. Yes, sir.

Q. Now, what did you do?

Mr. Rudin: Your Honor, I object to this line of questioning upon the question of an arrangement which is not copyrighted. By way of explanation, this was something [21] attached to the original Complaint which we objected to. There is only one copyrighted version or two copyrighted versions before this Court, and they are basically Plaintiff's Exhibits 1 and 2 as a unit and Plaintiff's Exhibits 4 and 5. And Plaintiff's Exhibit 3, something that someone else wrote, unless there is something to tie it up to somebody, is entirely immaterial, irrelevant and incompetent to any issues in this case.

Mr. Ruiz: The same objection.

The Court: Well, I think Mr. Rudin's objection is good, unless it is tied up.

Mr. Hoppe: No. Now, your Honor, we are going to go into that and I am going to show that the melody is the same as the other melody, and that this is the particular version of the song that was published and distributed to the people in the industry.

Mr. Ruiz: I have a further objection, your

(Testimony of Mildred Becker Schultz.)

Honor. I also object to the testimony of the witness to the effect that after the melody was copyrighted she then took it to an arranger who arranged it, and, therefore, the arrangement is no part of the copyrighted matter.

The Court: Well, I think at this stage of the proceedings, I will overrule the objection. Counsel says he is going to tie it in.

Mr. Rudin: All right, your Honor, subject to a motion to [22] strike from the evidence later on.

The Court: All right. I have to give him some latitude here.

Q. (By Mr. Hoppe): Now, would you please sing the melody in Plaintiff's Exhibit 3 for identification?

Mr. Ruiz: Could we have a copy of that, counsel, please?

Mr. Hoppe: I produce and will hand a copy to counsel.

Mr. Rudin: Would it help any if the plaintiff plays the piano? We have brought a piano into court.

Mr. Hoppe: The plaintiff can't play the piano. She can just sing.

Mr. Rudin: I am sorry. It is more accomplishment than I have, counsel.

Mr. Hoppe: Would you please sing the melody of that, Mrs. Schultz?

A. Yes; I will.

(Singing): "Work-in for the Ar-my, slav-in for the Ar-my! Breakin' my back, I ain't gettin'



(Testimony of Mildred Becker Schultz.)

no Jack, but I love—love it, yes! I love it; marchin' a-long, sing-in' a song, to-tin' a gun, al-ways be-in' on the run for the Ar-my, good old Ar-my, oh, many people thinks its rough, ma-ny people think its tough, they ain't kid-din', they ain't ribbin', they're just fool-in themselves; be-in' a solder, tak-in' the or-ders, al-ways with a smile, while I'm walkin' those miles for [23] the Ar—my, good old A—my, -my!"

Mr. Wolff: If your Honor please, I will interpose the same objection as to Mrs. Schultz's renditions of the music, that is Plaintiff's Exhibit 3.

Mr. Hoppe: Again?

Mr. Ruiz: Is that right, counsel, this is Plaintiff's Exhibit 3 that she sang from?

Mr. Hoppe: She sang from Exhibit 3.

Mr. Wolff: To Exhibit 3, I object in that 5 or 6 places I believe she made a misstatement of the music or a misrendition of the music; also that this arrangement is not involved as a copyrighted piece.

The Court: I overrule the objection, Mr. Wolff, and let it remain.

Q. (By Mr. Hoppe): Now, Mrs. Schultz, what did you do with sheets of music such as Plaintiff's Exhibit 3?

A. Well, I got these sheets of music and took them around to the various night clubs.

Q. How did you get the sheets of music?

A. Well, I took the original music that Mr. Fuller wrote out for me and I took it to a printing place and had about 500 sheets run off.

(Testimony of Mildred Becker Schultz.)

Q. And what did you do with the 500 sheets of music that you had run off?

A. Well, I took them every place I saw a band or heard [24] that somebody was there, to see if I could plug it and create a demand or do something with it, in order to——

Q. Would you place a time for that, Mrs. Schultz, give it as closely as you can?

A. Well, it must have been a few weeks after I received my copyright.

Q. But do you recall what year it was in?

A. It was in 1941.

Q. And in the year 1941, to what—where did you distribute Plaintiff's Exhibit 3 for identification?

A. Well, I took it to the Golden Gate Theatre.

Q. Where is the Golden Gate Theatre?

A. That is on Taylor; Taylor and Market, in San Francisco.

Mr. Wolff: Counsel, do you have the time that the Golden Gate Theatre gave access to the defendants in this action?

Mr. Hoppe: You weren't here during my opening statement, counsel.

Mr. Wolff: I am sorry.

Mr. Hoppe: I said as far as I know we have no direct proof of access; that our whole proof is going to be circumstantial. It was played at so many different places that as a consequence we are going to draw the inference that there must have been access.

(Testimony of Mildred Becker Schultz.)

Mr. Ruiz: Unless counsel likewise intends to indicate [25] that Jack Holmes might have been at any of these places and unless counsel at this time can state that he can tie that up, I believe all of this will be immaterial.

Mr. Hoppe: I don't believe so, counsel, but I don't propose to argue the legal aspects of our case until all the evidence is in.

Mr. Ruiz: That is the reason I propose to the court that counsel at this time state whether or not he intends to indicate that Mr. Jack Holmes was at any of these places or may have heard the music of any of these persons that she may have handed a copy of this to.

If he intends to tie it up that way, it is all right.

The Court: I overrule the objection.

Mr. Rudin: Your Honor, so we won't have to object each time, may be have an objection to the entire line of any distribution of music?

The Court: Yes. All right. You will have a continuing objection to this line of testimony.

Mr. Hoppe: I think for the purpose of clarity, your Honor, it will be understood that objection will go to this entire line, because it is going to take about 20 minutes.

The Court: Yes. That is what I understand. Mr. Rudin made that statement.

Q. (By Mr. Hoppe): Now, at the Golden Gate Theatre, [26] to whom did you show a piece of music there?

A. To Maxine Andrews of the Andrews Sisters.

(Testimony of Mildred Becker Schultz.)

Q. What did you do at that time?

A. You mean what happened at that occasion?

Q. Yes; what happened at that occasion?

A. Well, I don't remember too clearly, but I showed it to Maxine Andrews.

Q. You showed what, the sheet music?

A. The sheet music, to Maxine Andrews and she was interested in it, and I believe the text of the conversation, as I recall, was that she would have to show it to her husband.

Q. Did you leave her a piece of sheet music?

A. Yes; I left a piece of sheet music.

Mr. Rudin: Your Honor, I would like to urge the further objection that it is all hearsay evidence as to any of the defendants in this action, what Miss Andrews did or said.

The Court: I will let that part go out as hearsay.

Mr. Rudin: As to any conversation with Maxine Andrews.

The Court: That is right.

Q. (By Mr. Hoppe): Did you hear Maxine Andrews play the piece of music you left with her?

A. No, sir; I didn't.

Q. Did you ever hear the piece of music played at the [27] Golden Gate Theatre? A. No, sir.

Q. Now, where else did you take a sheet of music such as Plaintiff's Exhibit 3?

A. I took it to the Lion's Den.

Q. To where? A. Lion's Den.

Q. Where is the Lion's Den?



(Testimony of Mildred Becker Schultz.)

A. On Grant Avenue, in China Town, in San Francisco.

Q. What is the Lion's Den?

A. It is a night club.

Q. And what did you do with the sheet music at the Lion's Den?

A. I gave it to the piano player.

Q. And what did he do with the piece of music?

A. He played it before the people there and then the rest of the orchestra improvised on it and played it, and the people got up and danced to it.

Q. Where else did you take sheet music like Plaintiff's Exhibit 3 for identification?

A. Forbidden City.

Q. Where is the Forbidden City?

A. On Stockton and Sutter Streets, in San Francisco.

Q. And what did you do with the piece of sheet music at [28] the Forbidden City?

A. I took it to the conductor of the orchestra, who happened to be a piano player.

Q. And what did he do with it?

A. He played it, and then he had his arranger make an orchestration of it.

Q. And what was done with the orchestration of it?

A. It was played before the people in the place and they danced to it.

Q. Is the Forbidden City a night club also?

A. Yes, sir; it is.



(Testimony of Mildred Becker Schultz.)

Q. Do you recall any other place where you took Plaintiff's Exhibit 3 for identification?

A. The 365 Club.

Q. Where is the 365 Club?

A. That is 365 Market Street in San Francisco.

Q. And what is the 365 Club?

A. It is also a night club.

Q. And what did you do with Plaintiff's Exhibit 3 for identification at the 365 Club?

A. I turned it over to somebody in the orchestra and they played it.

Q. Now, can you think of any other place where you took Plaintiff's Exhibit 3 for identification?

A. The Seven Seas. [29]

Q. The Seven Seas is located where?

A. I am not sure whether it is Eddy or Ellis Street. It is somewhere in the downtown area, a few blocks off Market Street.

Q. On Ellis or Eddy Street a few blocks off of Market Street in San Francisco. What is the Seven Seas?

A. It is a night club with the Hawaiian theme to it and they had I believe the Hurtado Brothers, a Marimba band in it.

Q. They had whom?

A. I am not sure. It was a Marimba band.

Q. It was a marimba band. What did you do with Plaintiff's Exhibit 3 at the Seven Seas?

A. I turned it over to the orchestra and they played it.

Q. Where else did you take Plaintiff's Exhibit

(Testimony of Mildred Becker Schultz.)

3 for identification?           A. To Monaco's.

Q. What is the location of Monaco's?

A. That is on Pacific Street in San Francisco, or it was.

Q. And what is Monaco's?

A. A theatre-restaurant with a cocktail lounge.

Q. And what did you do with Plaintiff's Exhibit 3 for identification?

A. I turned it over to—I believe she played the organ—a woman by the name of Melba. [30]

Q. What did Melba do with Plaintiff's Exhibit 3 for identification?

A. She played it in the cocktail lounge.

Q. Now, Mrs. Schultz, were there any other places that you can think of?

A. Yes, sir; there is the Riviera.

Q. And what is the Riviera and where is it located?

A. The Riviera was located on Columbus Avenue, and there was a girl in there playing an organ by the name of June.

Q. And what did the girl by the name of June do with Plaintiff's Exhibit 3 for identification?

Mr. Rudin: Pardon me. Your Honor, I don't believe Mr. Ruiz will join in this, but just to save the court's time, we would be willing to stipulate that if the plaintiff continued to testify, she would go on for a number of times and testify, I am not stipulating the fact but that she would testify that she took this music around to a number of the night spots and bars and restaurants in the nature of bars

(Testimony of Mildred Becker Schultz.)

and night clubs and showed it to people there who played it, and some of them played it and some of them didn't play it, that it would be her testimony that it was played at a number of night clubs in San Francisco; we will stipulate that it was played at a number of night spots in San Francisco, but will not [31] stipulate the fact; to shortcut this a little bit.

Mr. Ruiz: I would join in that stipulation, providing we encompass the period of time which I understand is the year 1941.

Mr. Hoppe: That is agreeable with the plaintiff as the rest would just be repetition.

The Court: Was that in the year 1941?

A. Yes; it was.

Mr. Hoppe: We make the stipulation.

Mr. Rudin: Yes, the year 1941. That is what her testimony would be. We will not stipulate to the facts.

Mr. Hoppe: No. We just stipulate to the fact that she would testify to taking it to a number of places.

Q. Now, are all the places concerning which you have testified to, Mrs. Schultz, in the year 1941 and the added places that your testimony would bring out located in San Francisco?

A. I didn't hear you, sir.

Q. Are all the places concerning which you have testified located in San Francisco?

A. Yes; I believe they are.

Q. What, if anything, did you do with sheet

(Testimony of Mildred Becker Schultz.)

music like Plaintiff's Exhibit 3 for identification outside of the San Francisco area? [32]

A. Well, I know I sent one copy to, I believe it is Schumann Music Company, a publishing company in Hollywood, I believe, or Los Angeles, I am not sure which.

Q. Schumann Music Company in Los Angeles?

A. Yes.

Q. Are there any other places that you can think of that you sent Plaintiff's Exhibit 3 for identification outside of the San Francisco area?

A. In 1941 all I can remember offhand is the one that I sent to the Schumann Music Company.

Mr. Hoppe: Your Honor, we offer in evidence Plaintiff's Exhibit 3 for identification as Plaintiff's Exhibit 3.

Mr. Rudin: Your Honor, I object to that on the grounds that the Schumann Music publishing company is not a defendant in this action nor related to any of the defendants in this action. There is no tie-up of Exhibit 3 as having had any access to any of the defendants here. As a matter of fact, the testimony as to Schumann Music Company didn't go as far as to say that they received it. Schumann Music Company is not a defendant here. This is a copyright infringement action. They have to stand or fall on their copyright, and, therefore, Exhibit 3, insofar as it has any base arrangement or beat or varies from the copyright, is immaterial. [33]

The Court: She testified about it. I will overrule the objection and let it be received.



(Testimony of Mildred Becker Schultz.)

Mr. Ruiz: I have an additional objection, your Honor——

The Court: Yes. Pardon me, Mr. Ruiz.

Mr. Ruiz: ——at this time, with respect to Exhibit 3, concerning the base, clef, words and other matters, other matters than what she hummed from the witness stand, as being immaterial, and that the evidence be restricted solely to the melody which is the matter which is copyrighted and before this court.

The Court: Well, I will overrule the additional objection, Mr. Hoppe, and let it be received as Exhibit 3.

Mr. Hoppe: Thank you, your Honor.

(Said document was received in evidence and marked as Plaintiff's Exhibit 3.)

Q. (By Mr. Hoppe): Now, Mrs. Schultz, I call your attention to Plaintiff's Exhibit 5 in evidence, which is the sheet music "Waitin' for My Baby," number 172341, and ask you what you did after you obtained that particular copyright?

A. Well, I had about 20 copies photostated to distribute, to see if I could plug it, again, and I took it to various people.

Q. And I would like it if you would sing Plaintiff's [34] Exhibit 5 for us; would you sing Plaintiff's Exhibit 5 as copyrighted, which is the copyright number 172341?

The Witness: May I say, sir, that I am not a singer and I only sing the best I can?



(Testimony of Mildred Becker Schultz.)

Mr. Ruiz: We weren't objecting because of the fact that the witness is not a singer. She just wasn't singing the correct tones.

The Court: All right.

Q. (By Mr. Hoppe): Would you sing that piece of music as you read it?

A. (Singing): "Waitin' for my baby, please don't say maybe, let's set the date, cause I just can't wait, for I love, love you, yes, I love you, let's go find a Parson, to change your name to Carson. We'll be on our way to a hide a way. In the Val—ley, yes, the Val—ley. Oh, people think we're not so wise, but we know it's otherwise, they're not kid-din', they're not rib-bin, they're just foolin' them-selves, think it over, Baby, please don't say maybe, just say you'll be mine, and I'll be easy to find 'cause I lo—ve you, how I love you, Baby."

Mr. Wolff: Now, the same objection, if your Honor please.

The Court: All right. Overruled.

Q. (By Mr. Hoppe): Now, Plaintiff's Exhibit 6, what is Plaintiff's Exhibit 6? [35]

A. It is the original manuscript that I wrote for "Waitin' for My Baby," but I copied it from the original "Good Old Army."

Mr. Rudin: Just a minute. Would the reporter read that answer?

(Answer read by the reporter.)

Q. (By Mr. Hoppe): You mean from the original, 172341, that is this one here, "Waitin' for My

(Testimony of Mildred Becker Schultzs.)

Baby"? A. That is "Waitin' for My Baby."

Q. Now, this has unpublished number 172341 on it, on the front page; where did you get that number?  
A. Well, I recopied it.

Q. And that is from this Plaintiff's Exhibit 5 in evidence, is that right?

The Witness: May I look at the number sir?

Mr. Hoppe: Yes. You look at the numbers.

A. Well, this number here, this is the copyright number for "Waitin' for My Baby," isn't it, this 17——

Q. That is right.

The Witness: And "Good Old Army" has another number.

Q. (By Mr. Hoppe): That is right.

Now, on the front of Plaintiff's Exhibit 6 for identification, you have copyright number 172341, do you not?  
A. Yes, sir. [36]

Q. Now, I would like you to tell me how Plaintiff's Exhibit 6 came into being?

A. "Waitin' for My Baby?"

Q. Yes; that is this piece of paper that I have right here.

A. Well, I wrote the "Good Old Army Blues" in 1941, just before the War, and it was a good piece of music but the words weren't, I suppose, too patriotic during war time and I thought I had better put some other words to it so I could do something with it. So it took me all my time to think of anything that would fit that melody. The melody is still "Good Old"—"Working for the Army," but

(Testimony of Mildred Becker Schultz.)

then my girl friend and I rewrote it to "Waitin' for My Baby."

Mr. Hoppe: I don't think you understood my question, Mrs. Schultz.

Q. What did you do with this particular piece of paper, not the song, but this particular piece of paper?

A. Oh, I took the arrangement that Mr. Fuller made for me for "Good Old Army" and I copied the music from his arrangement and tried to rewrite some of the notes to fit the words in "Waitin' for My Baby."

Q. And that is how this Plaintiff's Exhibit 6 came into being? A. Yes, sir. [37]

Q. Then after you did that with this Plaintiff's Exhibit 6, what did you do with the piece of paper?

A. Well, I gave it to my husband, who was working for the American Can Company at the time, in the photostat and blue print department, and he ran off about 20 copies for me.

Q. And what is Plaintiff's Exhibit 7 for identification? A. That is a photostatic copy.

Q. Now, would you sing the melody of Plaintiff's Exhibit 6? And, your Honor, this will be the last singing we will have.

Mr. Rudin: Do we understand that Plaintiff's Exhibit 6 is any different than Plaintiff's Exhibit 5?

Mr. Hoppe: Plaintiff's Exhibit 5 has just the melody in it. Plaintiff's Exhibit 6 has the melody and the base.

Mr. Rudin: Well, is she singing the base?

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: She is singing the melody.

Mr. Rudin: Well, is it the same as Plaintiff's Exhibit 5?

Mr. Hoppe: The melody, yes.

Mr. Rudin: Well, she has already sang it, your Honor.

The Court: All right. She has already completed that.

Mr. Rudin: You don't need to do it, then, again.

Mr. Hoppe: Well, you sang it.

The Court: We will take about a five-minute recess.

Mr. Hoppe: All right. [38]

The Court: We will take a five-minute recess.

Mr. Hoppe: Thank you, your Honor.

(Recess.)

The Court: Just come to order. She will resume the stand again. All right.

Q. (By Mr. Hoppe): We were discussing Plaintiff's Exhibit 7 when recess was declared, and I wonder if you would tell me what you did with the photostats such as Plaintiff's Exhibit 7 for identification?

A. You mean where I took them?

Q. What did you do with these photostats that your husband made, such as Plaintiff's Exhibit 7 for identification?

A. I took them out and plugged them also. I took them around to various night spots and people to see if I could do something with them.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I don't want to be technical, but if you would just tell us approximately what period and where?

Mr. Hoppe: Yes.

Q. At what time was this, Mrs. Schultz?

A. This was in 1949.

Q. And what area did you cover with your plugging, what geographical area?

A. San Francisco and Hollywood.

Q. And where did you take Plaintiff's Exhibit 7 for identification, in San Francisco? [39]

A. I went to the Black Hawk cafe or night club.

Q. This was in 1949?

A. This was in 1949.

Q. And that was in what city, San Francisco?

A. San Francisco.

Q. What did you do with Plaintiff's Exhibit 7 for identification there?

A. I took it to the Eastman Trio.

Q. And what did they do with it?

A. They played it several times.

Q. Where else did you take Plaintiff's Exhibit 7 for identification, in 1949?

A. To the Hangover Club.

Q. In what city is the Hangover Club?

A. San Francisco.

Q. And what did you do with Plaintiff's Exhibit 7 for identification at the Hangover Club?

A. I left it with a man called Doc Evans and



(Testimony of Mildred Becker Schultz.)

His Chicagoans. They were appearing there at the time.

Q. And what did they do with it?

A. I have no idea, sir, because he was going to look it over and let me know, and when I went back for it, he was gone.

Q. And where else did you take Plaintiff's Exhibit 7 for identification? [40]

A. To Edgewater, out at the Beach, to Lionel Hampton.

Q. Was that in San Francisco?

A. Yes, sir; it was.

Q. And who is Lionel Hampton?

A. He is a big orchestra leader.

Q. And what did you do with Plaintiff's Exhibit 7 with Lionel Hampton?

A. Well, I gave it to him and he told me he turned it over to his arranger.

Mr. Rudin: Just a moment. Your Honor, I move to strike that from the record. That would call for actions or conversations outside of the presence of any of the defendants.

The Court: She said she gave it to him. I will let that remain.

Mr. Rudin: That part, yes.

The Court: All right.

Mr. Rudin: But what he said he would do, I move to strike.

The Court: Yes; that part may go out.

Mr. Rudin: Thank you, your Honor.

(Testimony of Mildred Becker Schultz.)

Q. (By Mr. Hoppe): And where else did you take Plaintiff's Exhibit 7 for identification?

A. I took it to Walt Norbriega.

Mr. Rudin: How do you spell that? [41]

A. The first name is Walt (W-a-l-t). The last name is N-o-r-b-r-i-e-g-a, I believe.

Q. (By Mr. Hoppe): And who was Walt Norbriega?

A. Well, he had a small orchestra in the Palace Hotel.

Q. In San Francisco?

A. In San Francisco.

Q. And what did he do with it?

A. He told me to take it up and give it to Jack——

Q. No. What did he do with it?

A. He played it before the people.

Q. Were there any other places in San Francisco where you took Plaintiff's Exhibit 7 for identification?

A. Yes; I took it to the Fairmont Hotel, to the Cirque Room.

Q. And this was in 1949? A. Yes, sir.

Q. And what did you do with it at the Cirque Room? A. I turned it over to Jack Ross.

Q. And who is Jack Ross?

A. Well, he has an orchestra playing in the Cirque Room.

Q. And what did Jack Ross do with it?

A. Well, I was told that he——

(Testimony of Mildred Becker Schultz.)

Q. No. Just what you know. Not what somebody told you.

A. He took my music and wanted to play it for the boys.

Q. Do you know whether he did play it for the boys? [42]

The Witness: He told me that——

Mr. Ruiz: I object to that, being told.

Q. (By Mr. Hoppe): Do you know whether he did or not? A. I didn't see him do it.

Q. To who else did you take Plaintiff's Exhibit 7 for identification?

A. Well, I know that The Vagabonds came out to see me about it.

Q. The Vagabonds?

A. Yes. Pete Peterson, I believe, his name is.

Q. What is The Vagabonds?

A. Well, they are a small performing orchestra.

Q. And what did they do with the sheet music?

A. I don't know, sir, but I just never got it back.

Q. Are there any places outside of the San Francisco area where you took Plaintiff's Exhibit 7 for identification?

A. Yes, sir; there is. I took it to Hollywood.

Q. And where did you take it in Hollywood?

A. To one place was the RCA Victor Building.

Q. The RCA Victor Building? A. Yes.

Q. And where did you take it to at the RCA Victor Building? Was this in 1949?

A. This was in 1949.

(Testimony of Mildred Becker Schultz.)

Q. Where did you take it in the RCA Victor Building? [43]

A. To a girl behind either a counter or a desk.

Q. Do you know whose office that was?

A. I believe it was a reception area of the building.

Q. And what company was it?

A. It was RCA Victor.

Q. What did you do with it there?

A. I gave it to the girl, and she said she would see if she could do something about it, and I left it with her.

Mr. Wolff: I object and move to strike out what she said.

The Court: Yes; that may go out. I will sustain the objection and that may go out.

Mr. Hoppe: Mrs. Schultz, you can't testify as to what people told you except if they are one of the defendants here.

The Witness: I see.

Mr. Hoppe: It is just what you did physically that I would like to bring out.

Q. Now, did you give her the sheet music?

A. Yes, sir.

Q. And did you get it back from her?

A. No, sir; I didn't; I don't know for sure, because somebody sent it back to me with no return address on it.

Q. Oh, somebody sent back to you the piece of sheet music that you gave to this girl? [44]

(Testimony of Mildred Becker Schultz.)

A. I don't know whether it was her or somebody else that I gave it to in Hollywood.

Q. Now, who else did you take the sheet music to in Hollywood?

A. To an arranger. I don't know the name of the street.

Q. What was his name?

A. I don't know, sir.

Q. How did you happen to go to that arranger?

A. I saw the name "Arranging" in front of the house, so I went in.

Q. Now, is there anyone else that you can recall in the Hollywood area that you took the sheet music to?

A. I took it to Maxine Andrews.

Q. Maxine Andrews?

A. Andrews, of the Andrews Sisters.

Q. Is that the same one you were talking about before?

A. Yes, sir.

Q. And what did she do with the piece of sheet music?

A. She kept it until 4:00 o'clock in the afternoon.

Q. And what did she do with it at 4:00 o'clock in the afternoon?

A. Her secretary or some woman in the office handed it back to me.

Q. What time of the day did you give it to her?

A. I am not sure, sir. [45]

Q. But you do recall that you got it back at about 4:00 o'clock in the afternoon?

A. I had an appointment to meet her at 4:00.



(Testimony of Mildred Becker Schultz.)

Q. Were there any other people in the Hollywood area to whom you handed Plaintiff's Exhibit 7?

A. Yes, sir; some recording company or some music publisher on Santa Monica Boulevard.

Q. Do you remember the name of it?

A. No, sir; I don't.

Q. And what did you do at this concern on Santa Monica?

A. I handed it to a girl working there.

Q. And what did the girl do with it?

A. I don't know, sir.

Q. Did you get it back?

A. I don't know which one sent it back to me.

Q. Oh, you don't? I am not trying to lead the witness. You don't know whether it was the RCA Victor Music you got it back from or the Santa Monica Boulevard people that sent it back?

A. I don't know which one it was. There was no return address on the envelope.

Q. Are there any other addresses in the Hollywood area where you took this piece of music? You mentioned the RCA Building, an arranger in Hollywood whose name you did not recall, Maxine Andrews and somebody at the Santa Monica [46] building.

A. I did take it to another arranger, but I don't remember the period of time that I did it.

Q. Were there any other places that you can recall where you took Plaintiff's Exhibit 7 for identification?

A. In San Francisco again.

(Testimony of Mildred Becker Schultz.)

Q. If you can, would you name some more in San Francisco, then?

A. I took it up to The Say When Club, to Billy Eckstein.

Q. Who is Billy Eckstein?

A. He is a singer.

Q. And what did Billy Eckstein do with the piece of music?

A. He looked it over and sang it to himself.

Q. And was there anybody else that you took Plaintiff's Exhibit 7 to?

A. Yes; I took it to a small colored band, I believe the name was Bunny Peterson.

Q. And where was Bunny Peterson located?

A. Over on Fillmore Street.

Q. In San Francisco? A. Yes, sir.

Q. What did he do with Plaintiff's Exhibit 7?

A. Well, he rehearsed it with his orchestra. He was going to make me a demo recording. [47]

Q. Were there any other places where you took Plaintiff's Exhibit?

A. Yes, sir; to Leo Killion.

Q. Who is Leo Killion?

A. I believe he is the man who wrote the Hut-Sut Song.

Q. And what did he do with it?

A. Well, he is the man who told me to get the——

Mr. Ruiz: Just a moment. I object to that.

Q. (By Mr. Hoppe): What did he do with it?

A. I don't know whether he kept a copy or not.

(Testimony of Mildred Becker Schultz.)

Q. After you took it to Mr. Leo Killion, what did you do with it?

A. Oh, I did have a small college musician that was going to try to cut me a demonstration record.

Q. Now, Mrs. Schultz, can you think of any other places?

A. I don't think so, sir, at this moment.

Q. Now, what was the first time you heard either "Blacksmith Blues" or "Happy Pay Day"?

A. I was working out in front of my house.

Q. When was this?

A. This, I believe, would be the summer of 1952.

Q. And would you please state the circumstances of that, now that we have the time and place?

A. I was out in front of my house working in the garden when my phone rang and I was called in the house and I was told [48] by——

Mr. Wolff: Objection, your Honor.

The Court: As to what she was told, yes, I will sustain the objection as to what she was told. She can't tell us that.

Mr. Hoppe: Your Honor, I don't think that this testimony will be objectionable on the basis of hearsay, because it is really a verbal act, and I think that after the testimony is heard there will be no objection to it, but I would rather have it brought out and then have it stricken if it is not admissible.

Mr. Wolff: Your Honor, he is attempting to put in testimony as to what opinion that witness had. I know what the testimony is.

(Testimony of Mildred Becker Schultz.)

The Court: I will let the ruling stand. I will sustain the objection, Mr. Hoppe.

Q. (By Mr. Hoppe): When was the first time you heard "The Blacksmith Blues," Mrs. Schultz?

A. When it came over the television on Sid Caesar's program, with the Hamilton Trio dancing to it.

Q. In what year was this?

A. I believe it was 1952.

Q. The summer of '52?

A. The summer of '52.

Q. Had you ever heard it before that time? [49]

A. No, sir.

Q. After hearing the song on the TV, what did you do?

A. I drove down to the grocery store and bought a copy of it, and I looked at the music.

Q. And what did you conclude?

A. I concluded that it was my own music.

Q. What did you then do?

A. I immediately—I can't say immediately—I believe this was on a Saturday—as soon as I possibly could, within a matter of a day or two, I went to Mr. Paul McCarthy, the City Attorney from Belmont, and showed him the music and asked him if he would help me with it; and he in turn sent me up to Mr. George B. White, a patent attorney in San Francisco.

Q. And George White is the attorney who filed the suit for you in the first place, up in San Francisco?

A. I don't believe he filed it.

(Testimony of Mildred Becker Schultz.)

Q. Oh, he didn't file the suit? A. No.

Q. Do you know whether George White advised any of the defendants of the infringement?

A. Yes, sir; he did.

Mr. Hoppe: Now, your Honor, before releasing her for cross-examination, I would like to play "The Blacksmith Blues" record and have her show points of similarity between [50] this record and her copyrighted music. We have a record player here.

The Court: You want to do that now?

Mr. Hoppe: Yes, sir.

The Witness: The "On" switch is on the front and you have to push a button down below in front, underneath the dial; you have to push it to the left.

(The recording was played.)

Mr. Rudin: This is one of the exhibits?

Mr. Hoppe: Yes. I will identify it in just a minute.

Mr. Rudin: That is Plaintiff's Exhibit 11. That is the Ella Mae Morse record.

Mr. Hoppe: That is the Ella Mae Morse record. This was Plaintiff's Exhibit 11, your Honor, that we are playing now.

(Recording played.)

Q. Now, Plaintiff's Exhibit 11, you have just heard that. Would you please sing from your piece the part of the melody that you believe is on Plaintiff's Exhibit 11?



(Testimony of Mildred Becker Schultz.)

A. (Singing): "Workin' for—Workin' for the Army down in ol' Ken-tuck-y"—

Do you want me to go on?

Mr. Rudin: Yes, please.

Mr. Hoppe: Yes, go ahead.

The Witness: Well, I never know what I was singing—— [51]

Mr. Hoppe: Go ahead.

The Witness (Singing): "Workin' for the Army, down in ol' Ken-tuck-y, hot sparks a-fly-in', Waitin' for My Baby," it's all the way through it, every other bar, it's to me my own.

Q. (By Mr. Hoppe): Now, Plaintiff's Exhibit 10, which is "Happy Pay Day," I want to play that now.

(Said recording was played.)

Now, in Plaintiff's Exhibit 10, would you please hum the part of the tune there that you believe is in your copyrighted music?

A. Well, it is the same as "Blacksmith Blues," only it is slurred just a little.

Q. Would you——

A. "Workin' for the Army, slav-in' for the Ar-my, waitin' for my baby, don't say maybe"—

Mr. Hoppe: Now, we have Plaintiff's Exhibit 9, which is "Happy Pay Off Day," and I would like to have you listen to that and point out to the court where you think the similarity is. Listen to this first.

(Recording played.)

(Testimony of Mildred Becker Schultz.)

Q. (By Mr. Hoppe): Now, would you hum from your piece of music that you think is in common between Plaintiff's Exhibit 9 and your music? This (indicating) is Plaintiff's Exhibit 9. [52]

A. "Workin' for the Army, slavin' for the Army, let's go find a Parson, to change your name to Carson, think it over, Baby, please don't say maybe."

Mr. Hoppe: You may cross-examine.

The Court: Should we start at 2:00 o'clock, Mr. Rudin?

Mr. Rudin: It is all right with me.

The Court: Make it 2:00 o'clock.

Mr. Hoppe: Thank you, your Honor.

Mr. Rudin: Your Honor, what is your usual practice as to adjourning time?

The Court: We run to about 4:00 o'clock. We run until 4:00 unless there is some witness that is trying to get away on an airplane.

Mr. Rudin: Thank you.

(And, thereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, September 17, 1957.) [53]

Tuesday, September 17, 1957—2:00 P.M.

Mr. Hoppe: May it please the court, I have finished my direct of Mrs. Schultz.

The Court: That is right.

Mr. Hoppe: But I forgot to offer Exhibits 6 and 7 for identification.

The Court: All right. They may be received.

Mr. Rudin: That is subject to our same objections, your Honor.

The Court: Yes. I will overrule the objection.

### MILDRED BECKER SCHULTZ

the plaintiff herein, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: She is ready for cross-examination. He has finished the direct examination. Mr. Ruiz, do you want to lead off?

Mr. Ruiz: Thank you, sir.

### Cross-Examination

By Mr. Ruiz:

Q. Mrs. Schultz, I understand that from the year 1941 up until the year 1952, you sent through the mails only one time either one of the songs that you referred to here as "Good Old Army" and "Waitin' for My Baby," is that correct?

A. All that I could recall at this moment is that I [54] sent it to the Schumann Music Company.

Q. That was the only one?

A. No. Until '52. I may have mailed it to Paul Barraet of Sky Streak Record Company: I am not sure.

Q. But you are not sure of that. And with respect to the musical composition which you sent to Schumann Music Company, which was it, was it "Good Old Army" or was it "Waitin' for My

(Testimony of Mildred Becker Schultz.)

Baby"? A. That was "Good Old Army."

Q. And it is true, is it not, that that was mailed back to you? A. Yes; it was.

Q. And on the envelope there appeared the word "Refused"? A. Yes, sir.

Q. That is all. Now, is it correct, is it a fair statement to state all other persons you knew of who received copies of either one of those songs were given copies by you, personally?

A. Yes, sir.

Q. Is it my further understanding and would it be a fair statement to state that you made no recordings whatsoever?

A. Do you mean, sir, records?

Q. Records?

A. I am trying to think back. I have another song and I [55] recorded that one. I am trying to think if I recorded this one.

Q. Well, wasn't your testimony this morning to the effect that you attempted to have one of these or these recorded but that there were no recordings made? A. That is right.

Q. Do you have any recollection of ever personally meeting Jack Holmes?

A. I have never been formally introduced to the man, so, therefore, I don't know whether I ever met him.

Q. Then, your answer is that you have no recollection of ever having met Mr. Jack Holmes?

A. Not under that name.

(Testimony of Mildred Becker Schultz.)

Q. Have you ever met Mr. Jack Holmes under any other name, to your knowledge?

A. I don't know who the gentleman is, sir, so I don't know whether I met him or not.

Q. Very well. Now, I think you stated that you first thought up the melody when you were walking down the street?

A. I was walking uptown, if my memory is correct.

Q. And you were just walking along?

A. I was walking uptown with my girl friend and I thought it up after I had met our friend. That is the first time I ever thought of it.

Q. Well, were you walking along when you originated it, or was it after you met your friend?

A. It was after—I met the friend half way uptown and after we left him, that is when it came to me, while I was walking.

Q. While you were walking. By the way, you have never published either one of these songs—you have never copyrighted either one of them as a published item, these musical compositions?

A. I don't have published copyrights. I have unpublished copyrights.

Q. Unpublished copyrights. Now, as you were walking, did you give the song that you originated at that time a tempo of a march or a walking song?

A. Let's say it's a march with a beat.

Q. You mean a syncopated walk?

A. A syncopated walk.



(Testimony of Mildred Becker Schultz.)

Q. And this musical composition can be played as a waltz, can it not?

A. No, sir. It is not in three-quarter type.

Q. You have heard it played as a waltz, haven't you?

A. I have heard it played as a waltz, yes, but it is not written as a waltz.

Q. And you have heard it played as a rumba?

A. That is right.

Q. And you heard the same sequence of notes played in [57] Dixieland style as well, have you not?

A. May I ask you what you mean, sir, by Dixieland style?

Q. Did you know any Dixieland band?

A. Yes, I did. I met Doc Evans and His Chicagoans with the Dixieland band.

Q. And you gave him the music, did you not?

A. Yes; I did.

Q. Did you ever hear it played as Dixieland music?

A. Not by him.

Q. By anybody else?

A. At this moment, sir, I can't recall exactly a Dixieland—well, I have written it—it can be played as a Dixieland beat, but I don't know; my impression of Dixieland is improvisation on all parts of the instruments. Is that what you mean?

Q. I don't know. I was just wondering what your interpretation was, Mrs. Schultz.

A. Well, to me a Dixieland band is one where everybody jumps in on the theme, and if that is

(Testimony of Mildred Becker Schultz.)

what you mean, I have never heard it played that way.

Q. Now, do you claim origination in this musical composition with respect to the sequence of notes, irrespective of style that it may be played?

A. Well, I don't know if you mean, sir, that I originated the key of E or G. [58]

Q. No; I am not talking about key. I am talking about the sequence of notes, the theme of the song, about what you have been referring to?

Mr. Hoppe: May it please the court, I object to the question, because her contention of the breadth of the copyright doesn't have anything to do with the lawsuit. It is a question for the court to decide.

The Court: I will overrule the objection.

Mr. Ruiz: Will the reporter read the question, please?

(Pending question read by the reporter.)

Q. Is that where the origination or the originality of it, of this particular melody is?

A. I don't know what you mean, sir. Did I originate this one particular bar that you are talking about, the sequence of notes?

Q. Now, you have been talking about one particular bar all the time, haven't you?

A. Yes.

Q. And when you sang from the witness stand, you sang four different bars, did you not?

A. I sang I believe the same music but different words.

(Testimony of Mildred Becker Schultz.)

Q. In other words, you repeated one bar four different times, is that not correct?

A. Musically, yes.

Q. Musically you repeated one bar. Now, how many notes [59] does that bar contain?

The Witness: Well, I——

Q. (By Mr. Ruiz, continuing): Will you please look at the exhibit and tell us how many notes that this original bar contains, and I am showing you Plaintiff's Exhibit 2 entitled "Good Old Army" and Plaintiff's Exhibit 5 entitled "Waitin' for My Baby"? Give us the number of notes in this particular bar.

A. There are six notes.

Q. There are six notes? A. And a rest.

Q. There are six notes and a rest?

A. And a rest.

Q. All right. Therein lies the originality of your musical composition?

A. Yes, sir.

Q. Do you know how many bars there are in "Blacksmith Blues"?

A. At this moment, I think there are 16 bars of the main theme.

Q. And 16 bars more, besides the bars of the main theme?

A. No, sir. There is an introduction in it that I don't believe has anything to do with the main theme, but I believe there are 16 bars of the main theme.

Q. Now, getting back to these seven notes, I believe you [60] stated that those are the notes that you played as originality.

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: Six notes.

Q. (By Mr. Ruiz, continuing): Six notes. I am sorry.

The Witness: Six notes.

Q. (By Mr. Ruiz): Will you hum those six notes for me, please? A. (Humming.)

Q. Like "Old Black Joe" (humming), do you mean, is that it? A. No, sir.

Q. You know "Old Black Joe," do you not?

A. I have heard it.

Q. And isn't it true that "Old Black Joe" starts (humming)?

A. (Humming): Isn't it "Gone are the days"? Well, to me it doesn't sound like my song. I may be wrong.

Q. Have you heard any other songs that in their introductory phrases have the same sequence of notes?

A. When you say introductory phrases, are you speaking of the introduction or of the theme of it?

Q. I am thinking and I am speaking of the first bar of a theme?

A. Well, all music is made of certain notes, but I claim my originality on the syncopation. [61]

Q. Now, will you please explain to us what you mean by your original syncopation, Mrs. Schultz?

A. It is the beat of the song. It's a beat with a hop, an after beat on each note, with an accent on the first beat.

Q. You mean some notes have more value than other notes? A. Yes, sir.

(Testimony of Mildred Becker Schultz.)

Q. Is that what you mean? A. Yes.

Q. And is that where your originality lies?

A. My originality lies I believe with the syncopation of this bar and the sequence. It may be used in some other songs that you may find, but I don't think they sound like mine.

Q. Well, you have heard the Marine's Song (humming), the way that starts out?

A. (Humming): Well, that is a pickup.

Q. I am talking about one bar, the introductory bar of the theme; those are the same sequences, are they not, and is that not a syncopation?

A. I don't know. If you could show me a copy of music. It is easy to interpret music, but it is easier to see the way it is written. You can take one piece of music and play it any way you want.

Q. Well, we will give you plenty of opportunity to go into copies, but at the moment we are speaking of melodies, even [62] up to this phase.

Now, have you heard, the question is, other songs use the same sequence as to the introductory phrase or bar of the theme?

A. Well, there must be an awfully lot of them that use the same notes, because there are only so many notes in music.

Mr. Ruiz: No further examination.

Mr. Rudin: Just a moment, your Honor.

Does your Honor have any objection if we split the cross-examination?

The Court: No.

Mr. Rudin: And counsel?



(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: None at all.

**Cross-Examination**

By Mr. Rudin:

Does counsel have any objection if I ask the witness to show me how she was walking at the time the idea of the song came to her?

Mr. Hoppe: I wouldn't have any. Would you mind?

The Court: Do you want her to illustrate?

Mr. Rudin: How she was walking, yes, your Honor.

The Witness: May I say, Mr. Rudin, that was many years ago, and I am a tap dancer and I can go into any beat, but I will give you my best recollection.

Q. (By Mr. Rudin): Well, before you do that, let us understand [63] the circumstances. You were walking with a friend, weren't you?

A. Yes, sir.

Q. Was your friend a tap dancer?

A. No, sir.

Q. You were walking together, were you not?

A. Yes; but I had a habit of practicing tap when I walked.

Q. Were you practicing tap at the time you wrote the song?

A. I was dancing along, sir.

Q. Oh, you weren't walking; you were dancing?

A. Well, let's say I was walking with a light beat.

(Testimony of Mildred Becker Schultz.)

Q. Will you show us what you mean by walking with a light beat?

A. It is kind of hard for me to recall. (The witness demonstrates.)

Q. That is how you were walking along the street at the time? A. Yes, sir.

Q. Isn't that rather unusual, to be walking that way? A. I guess I am an unusual character.

The Court: You will have to turn around. I couldn't hear you. When you answered that, you were facing Mr. Rudin and I couldn't hear your answer.

The Witness: Mr. Rudin said—what did you say, sir? [64]

The Court: "Unusual."

The Witness: "Unusual."

Mr. Rudin: I asked isn't that rather unusual, to walk that way?

A. Well, I stated that I am an unusual character and like to walk like that.

Q. And that is how the beat came to you?

A. Yes, sir.

Q. Is that a rather common tap dance beat?

A. No. That is walking with a heel and a toe.

Q. You have done that for many years, haven't you, in your routines?

A. Well, it's part of tap dancing. I mean, there are many steps in tap dancing and different beats, but I find that by being conscious of my heel and my toe that it helps me with my tap.

Q. Well, was that a routine that you had de-

(Testimony of Mildred Becker Schultz.)

veloped in your tap dancing, that you had used before?

A. No, sir. It is just a walk with a beat you will find—well, it is going a little bit into detail.

Q. Well, let us go into detail. Was it a beat that you ever used in dancing before?

A. I am trying to think. I believe it is used in the Continental, which is a tap dance.

Q. Have you ever done the Continental as a performer? A. Yes, sir; I have.

Q. Prior to 1941 have you seen other people do it? A. The Continental?

Q. Yes. A. You mean the tap dance?

Q. Yes.

A. The Continental is a tap dance which was created, I believe, by a Mr. McLean, that I studied from, and it's a dance within itself and there are various, there are a lot of unusual steps in it.

Q. This sort of thing you showed us, this sort of syncopation or off-step beat was one of the rhythms used in that Continental dance, was it not?

A. Well, I am not sure, sir.

Q. Well, did you ever use that beat in any other routine that you ever did?

A. I have to think back too many years ago to remember what routines I did do and what steps I used.

Q. Try to think back, Mrs. Schultz.

A. Well, I have to think of the music I could have used. I don't know offhand if it is a standard step.

(Testimony of Mildred Becker Schultz.)

Q. My question is not whether it is a standard step, Mrs. Schultz. My question was as to this particular beat that you were doing, that particular walk insofar as your tap dancing, as I understood it, whether you had ever [66] danced to such a beat?

A. Well, I don't know, sir. I know that is the way I walked uptown that day.

Q. Well, how would you think, did you just walk that way but you didn't dance that way?

A. Well, when you have a rhythm in your mind, you will dance or walk according to the rhythm in your mind.

Q. I see. Was this rhythm in your mind the first time that rhythm had ever been in your mind, that day?

A. Yes, sir. This song, when it was created, the uttermost thing in my mind was "I love it," and then as I walked along then it was born.

Q. Did you walk along or did you dance along? Let us clarify that phase of it.

A. A person actually doesn't dance up the street, but they may walk in rhythm.

Q. And this rhythm was something that you had never used before in any dance routine?

A. I don't know whether—I think there is a step in the Continental where you take it into a break. I am not sure.

Q. Now, that step in the Continental is where some music had been written for that particular Continental dance?

(Testimony of Mildred Becker Schultz.)

A. Yes; it is the Continental. As a matter of fact, it's [67] a slap on in front.

Q. Pardon me?

A. I am sorry. I am talking tap dancing words.

Q. That is all right. I would like to have you repeat the words.

A. I am trying to think of the opening of this Continental. I know it has got numerous steps in it and they are all variations and I am trying to remember exactly where I used that step.

Q. In other words, the music Continental is played with various rhythmic variations as part of this Continental dance routine which your teacher had devised, is that correct?

A. It has many variations in it and you don't always—sometimes you will dance against the rhythms; you break them up and syncopate them yourself. I am trying to think back to that Continental. I know that—can I give you—well, maybe you don't want me to dance in court.

Q. Pardon me.

A. Maybe you don't want me to dance in court. I was going to give you a demonstration.

Mr. Rudin: I have no objection.

The Court: That is all right. Dance, if you want to.

The Witness: Is that all right?

The Court: Yes. [68]

The Witness: I want to give you an idea of what a tap dancer will do with music. Now, this is a



(Testimony of Mildred Becker Schultz.)

step that is broken up in all different rhythms, but it actually doesn't follow the music.

(The witness dances.)

I mean that music can't follow every beat. You break up and syncopate the beats to the music.

Mr. Rudin: I see.

Q. Now, in connection with this little walk, would you do that again, that you were doing at the time you wrote it?

A. (The witness illustrates.)

Q. Isn't that a rather common dance routine, to see someone come on the stage that way (illustrating)?

A. I guess it is.

Q. That sort of a beat and where someone comes on the stage that way, at the beginning of a ball? Resume the stand, Mrs. Schultz. When somebody comes on the floor with that kind of step and comes on the stage with sort of a limp or a tilt to them, isn't there usually music played in accompaniment with it?

A. Isn't there usually a vamp, an introduction when you come out like that?

Q. Yes. It could be any sort of a piece of music written to bring on that tilting step, isn't that true?

A. Sometimes they go (humming), then you come out, or [69] you can come slap-on.

Q. In other words, depending on how the man comes on the stage, it is a rather common entree for a dancer or other performer to come on the

(Testimony of Mildred Becker Schultz.)

stage, not just walk on the stage as though he were out to be running for Governor but to come on the stage with a step to get the audience livened up, they come out with a syncopated walk or something of that kind?

A. Did you ask me a question?

Q. Yes, isn't it usual for a performer to come out on the stage with a syncopated walk similar to the one you just did?

A. I have seen them come out with every type of step there is.

Q. Including the one you just did?

A. I think so, sir.

Q. And you have heard music to the accompaniment of that type of step, have you not?

A. I don't recall at this moment whether I have heard the exact music that would fit that step.

Q. Now, did you testify that you wrote this as sort of an Army song?      A. Yes, I did.

Q. Do you recall the sort of step you did, this loping thing, walking beat? [70]

A. I would say it would be walk with a bounce.

Q. A walk with bounce. It is not really a walking beat?      A. Well——

Q. It is not a marching song either?

A. No, but I have noticed since that the Army counts off almost in the same style.

Q. You have since, but we are talking about 1941.      A. Yes.

Q. When you wrote the song, did you write it as a walking song?

(Testimony of Mildred Becker Schultz.)

A. All I know is that I was walking when I wrote it and my feet carried along in the same beat.

Q. What I am getting at is, did you write the song with the rhythm in mind for people to walk to it or for people to sort of run along and syncopate?

A. Syncopation.

Q. It is not a walking song, then, is it?

A. No, but the accent is on the on-beat.

Mr. Rudin: Counsel, do you have the original deposition of the plaintiff?

Mr. Hoppe: The court reporter has it here.

Mr. Rudin: Will you give it to the witness. This was taken on March 1, 1955.

Mr. Hoppe: Would you refer to the page, Mr. Rudin?

Mr. Rudin: Yes, I will, counsel. Thank you. [71]

Q. I would like to direct your attention, Mrs. Schultz, to your testimony on page 17, the question on line 13 and the answer on line 15. The question is:

“With respect to the melody itself, it did not come to you all at once, did it?”

And your answer was:

“As I walked I hummed it to myself. It’s a walking song, has a walking beat.”

Did you so testify on that day, Mrs. Schultz?

A. Yes, sir.

Q. Now, do you desire to change your testimony and say that it does not have a walking beat, it has a dancing beat?

A. I don’t know if I said it had a dancing beat,

(Testimony of Mildred Becker Schultz.)

I don't know if I testified that way. I say it is a walk with a bounce.

Q. That is not a walking beat, walking with a bounce, people don't walk with a bounce?

A. Some people do.

Q. People combine the dance and walk, isn't that correct?

A. The majority of people may walk straight, but there are some people who do walk with a bounce.

Mr. Hoppe: Pardon me a moment. I don't think it makes any difference, your Honor, what language we use for this beat. It is written down. Some people might call it a walk, some people might call it a bounce, some people [72] might call it anything, but I think the important thing is what it is, rather than what this witness calls it, and I object to any further testimony along the line as to what name we are going to give this particular beat.

Mr. Rudin: We have had two important concessions from his witness as to the plaintiff's claim and no direct answer, and on cross-examination this witness testified that her claim to originality was to the syncopation. I think our whole position will be to show that if there is any similarity at all in these compositions it is in the forenotes and the forenotes are somewhat different than the forenotes in "The Blacksmith Blues," being a common syncopation beat, and I want to find out. If this witness testified that she wrote a walking song, I want

(Testimony of Mildred Becker Schultz.)

to know where the beat came into it, and I think it is proper evidence for cross-examination.

The Court: I will overrule the objection.

Q. (By Mr. Rudin): Now, you know musical terms, Mrs. Schultz, don't you; you have been around dancers and entertainers, and a walking beat has a very definite connotation in music, does it not?

The Witness: I don't know what you mean by that. What was the word you used?

Mr. Rudin: Walking beat. [73]

The Witness: No. What did you say?

Mr. Rudin: Connotation, common meaning, people call it, when they describe something in musical terms in the entertainment field. Does it not?

Let me phrase the question this way:

Suppose an entertainer came around to do a bounce performance and there was an orchestra there and the orchestra leader didn't have the kind of music he wanted and in trying to tell him what type of music he wants for his routine, said, "When I come on with my partner, my straight man, give me a walking beat," the orchestra leader would know what he meant by a walking beat, would he not?

A. Yes, that would be a straight 1, 2, 3, 4, but if he walked with a bounce, it would be 1, 2-3, 4.

Q. Then he would say "Give me a walking bounce"?

A. He would say "Cut time" I believe is the phrase.



(Testimony of Mildred Becker Schultz.)

Q. He would say "Cut time," but he wouldn't say "Give me a walking beat," would he?

A. I think he would say a 4-4.

Q. Now, you have heard those records played. The one of Ella Mae Morse, Plaintiff's Exhibit 11, does that have a walking beat to it?

A. It doesn't have a walking beat. It has the beat that I use. [74]

Mr. Rudin: I move to strike the last part of the answer.

The Court: Yes, it may go out. It may go out.

Q. (By Mr. Rudin): Now, this music you sent to Schumann Music Publishing Company, that came back, the envelope came back unopened, did it not?

A. Yes, sir.

Q. Do you have that here in court?

A. I believe Mr. Hoppe has it, sir.

Mr. Hoppe: Yes, we have it here in court.

Q. (By Mr. Rudin): And that is the only time you submitted the music to any music company that you know of, is that correct?

A. At this time that is my best recollection.

Q. By mail? A. By mail.

Q. Now, this envelope is opened, Mrs. Schultz; it wasn't returned to you opened, was it?

A. No. It had a clip on the back. It was clip-closed.

Q. And it was returned in that manner?

A. Yes, sir.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: May I have this marked as Defendants' Exhibit A, for identification?

The Clerk: A.

The Court: Yes, A. [75]

(Said envelope was marked as Defendants' Exhibit A, for identification.)

Q. (By Mr. Rudin): Did I understand you, Mrs. Schultz, to say that your song written by you, the "Good Old Army" had the accent on the on-beat?

A. Well, I have to look and see, sir. I may be a little confused.

Q. Yes, please. Which copy of your song do you want?

A. There is more time value to the on-beat than there is to the off-beat.

Mr. Rudin: Do you have a copy here of Plaintiff's Exhibit 2?

Mr. Hoppe: You have Plaintiff's Exhibit 2, I think, don't you (addressing the witness)?

Mr. Rudin: This isn't 2.

Mr. Hoppe: Here is 2. The witness has Exhibits 2 and 5.

Mr. Rudin: I am sorry, counsel, if this is 2. Your Honor, I am a little concerned. This is not what was exhibited to us as 2, because 2 is what was purported to have attached the Copyright Deposit stamp and described as such.

Mr. Hoppe: It has been misnumbered.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I am afraid it has been incorrectly marked.

Mr. Hoppe: No. 2 is the one that is in the Complaint. 2 is the one that is in the Complaint. [76]

Mr. Rudin: That is where the confusion came in.

The Clerk: Yes.

Mr. Rudin: May this be withdrawn? It is really the same as 3.

Mr. Hoppe: Where did you get that?

Mr. Rudin: May we have permission to take the exhibit directly from the Complaint and use it?

The Court: Yes.

Mr. Hoppe: It has already been given a number.

Mr. Rudin: Oh, I am sorry.

Mr. Hoppe: Just take it right out. This is 2 (indicating) and this is 5.

Q. (By Mr. Rudin): Now, you say that the accent is on the on-beat. Could you designate the note and mark it, if you would, with this red ball point pen, also as to where, what you consider the on-beat?

A. Well, this has half time more value on the on-beat, the first beat.

Q. That is the very first note?

A. Yes, the first note. There is a dot after it and that gives you a little more time.

Q. And that would be a C?

A. That would be a C. And this here (indicating) has a tail on it, so it takes a half away from here and the same follows through, there is a dot after the E (indicating) [77] and there is a tail on the

(Testimony of Mildred Becker Schultz.)

next E, so this (indicating) is time and a half more than this (indicating) time, and this here (indicating) is I believe an eighth and that takes away from here (indicating) and ties a half time more on the G.

Q. And as I understand, then, basically in your first measure there in "Workin' for the Army," you have six notes and as to the first two notes they both are C? A. Yes.

Q. And they are not equal notes except half of the time is taken from the second note and placed on the first note? A. That is right, sir.

Q. And as to the third and fourth notes, they are again sort of a couplet, being the note E——

A. Yes.

Q. ——and again half of the time is taken from the second E and put on to the first E?

A. The time is taken away from the second and put on the first.

Q. And put on the first E?

A. That is right.

Q. In other words, in the same manner as the first two notes? A. That is right.

Q. And the last two notes of the measure, there being six [78] notes in the measure, are an F and a G? A. Yes.

Q. And this time the time is taken away from the first two notes and put onto the last one?

A. It is taken on to the back of the G, the last note.

Q. Now, you have wrote music before, haven't you? A. Yes.

(Testimony of Mildred Becker Schultz.)

Q. Isn't that a rather common occurrence in music, to have six notes like that with the time value going onto the first note?

A. Well, that is one way of writing music.

Q. It is one way of writing it syncopated, is it not?

A. That is right, but it depends on where the dot is, to give the time value.

Q. All right. In other words, if you had four quarter notes——

A. Yes.

Q. ——you would have a straight beat there?

A. 1, 2, 3, 4.

Q. That is right.

A. Or you can break time and get two eighths (humming).

The Court: A little louder.

(The witness hums.)

The Court: Go right ahead.

Q. (By Mr. Rudin): Now, isn't this type of breaking up the [79] notes something you have seen before in musical literature?

A. It has to be. Music can only be written in one way.

Mr. Rudin: I see.

The Witness: Here is your song (indicating), sir.

Mr. Rudin: Thank you.

Q. As I understood your testimony, the first time you heard the song "The Blacksmith Blues" was about in the summer of 1952?



(Testimony of Mildred Becker Schultz.)

A. I presume so.

Q. And it was in connection with Sid Caesar's program?

A. Yes, sir.

Q. And what time of day was it?

A. I don't know. It was in the afternoon sometime. I was working outside. I had no idea exactly what time it was.

Q. And prior to that time you had never heard the song before?

A. No, sir.

Q. What type of a dance step were they doing to it?

A. A bounce. They were wearing jeans, the Hamilton Trio.

Q. Was it a common sort of a bounce?

A. Well, they have a style of their own, I mean being a dancer and observing their type of music and dancing, I would say that it would fit them. I don't know if I can explain. I mean they do dance differently than most dancers. [80]

Q. Did the music fit their dance?

A. Yes, sir.

Q. They were dancing their step with the music?

A. Yes, sir.

Q. Was the music played as "The Blacksmith Blues" is ordinarily played?

A. I can't recall at this time, sir.

Mr. Rudin: No further questions.

The Court: Mr. Wolff, any questions?

Mr. Wolff: No, sir.

The Court: Mr. Ruiz, any questions?

Mr. Ruiz: No further questions.

(Testimony of Mildred Becker Schultz.)

The Court: Do you have some more, Mr. Hoppe?

Mr. Hoppe: Just a few on redirect, your Honor.

The Court: Certainly.

### Redirect Examination

By Mr. Hoppe:

Q. Now, Mrs. Schultz, one of the last questions that Mr. Ruiz asked you had to do with the fact that you had heard the same notes before as the introductory portion to a song. Do you recall that question?

The Witness: Well, do you remember how he phrased it, sir?

Mr. Hoppe: Would you, Mr. Reporter, read the last question that Mr. Ruiz asked on cross-examination?

(Record read by the reporter.)

Q. Now, by that do you mean that you had known the same [81] sequence of six notes in an introductory bar to a song before?

A. No, sir, I can't recall that I know any exact song that is used the same way.

Q. And when you were examined about the fact that you thought that your syncopation was original, were you disclaiming any originality in the sequence of notes or in the value to the notes?

The Witness: Can you ask me that again, sir?

Q. (By Mr. Hoppe): When you say that the syncopation was new, were you endeavoring to tell us that you didn't think that the combination of notes was new?

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I object to the question, your Honor, as leading and suggestive and argumentative.

The Court: It is, but I will overrule the objection. You may answer.

A. I don't know exactly how to answer that. I know that it was new to me, if that is what you mean.

Q. (By Mr. Hoppe): And what about the value of the notes?

A. I can't think of any song offhand that has the same, exact syncopation.

Q. And what about the values of the little tails and all that on the notes? I don't know anything about music, you understand.

A. Well, all music is written in time value, and you [82] cannot write music without having to use the same breaking up of notes. There is only one way of writing music. You can't invent a new way. There is a dotted eighth, there is a sixteenth note, there is a quarter note, a half note, and all music must use the time values somewhere in their music, or else there is no music.

Q. Now, looking at the whole thing as a unit, that is the syncopation as you call it, and the particular order of the notes and the value of the notes, have you seen that before?

A. No, sir, I have not.

Q. Now, are there any other similarities that you noted between your music and "The Blacksmith Blues" or "Happy Pay Off Day," other than the

(Testimony of Mildred Becker Schultz.)

sequence in the six notes and the syncopation and the values?

A. Well, in my opinion, it follows the same theme, because where I have "Breakin' My Back," they got horse "shoes"—I mean they follow the same theme and then it jumps back into the first bar again.

Mr. Hoppe: That is all.

Recross-Examination

By Mr. Ruiz:

Q. Mrs. Schultz, are you claiming originality to the beat or are you claiming originality to the sequence of notes?

A. I am claiming originality to the sequence of notes with [83] the beat.

The Court: Both, she says.

Mr. Hoppe: Both.

A. I did not originate an E or a G or an A.

Q. (By Mr. Ruiz): In other words, the beat is what you have referred to from the witness stand as "1 and 2 and 3," etc.?

A. Not exactly that way, sir.

Q. Well, that is what I heard, now. In what way?

A. Well, the sequence with the syncopation I am claiming.

Q. Then, you don't claim this "1 and 2" and bounce has any part of any originality in so far as these six notes are concerned involved in this lawsuit?

(Testimony of Mildred Becker Schultz.)

A. Well, I haven't checked all music, but there must be some place in music where there is a dotted eighth and a sixteenth note.

Q. Is that the "1 and 2 and"—

A. Well, it is not exactly that way. It's a series of syncopation that creates an effect. I am claiming that I originated the effect. I don't know if I make myself clear, sir.

Q. Please continue, because I am trying to understand it, Mrs. Schultz.

A. Well, if I may speak, music is music. It is a hard [84] subject to define.

Q. Yes.

A. It is made up of a series of notes and syncopation and you can play the same song a dozen different ways but you cannot change the theme.

Q. Well now, does this syncopation that you are speaking of continue all the way through your song?

A. No, sir. It doesn't.

Q. It only appears in one bar?

A. No, sir. It appears—it is repeated in two bars and then it comes, I think—I am not sure now without looking at the music—that there is a two-bar break, then it comes back to the original again and then it is repeated.

Q. But it is the same four or five or six notes, isn't it?

A. Not all—the syncopation may be changed a little bit to fit the words, but it sounds the same.

Q. And what we are speaking about here is one bar, is that not true, that is repeated?



(Testimony of Mildred Becker Schultz.)

A. Yes, sir.

Q. And this particular syncopation and theme in this particular one bar is repeated on two occasions throughout the entire song, is it not?

A. Which one are you speaking of now, the Blues?

Q. Well, we will say in "Waitin' for My Baby."

A. I believe in "Waitin' for My Baby" it is repeated six [85] times.

Q. But it is the one bar?

A. Well, in music, again, it is like writing a book; the main theme is what comes to your ear; you build a bridge, you get away from it, but you always come back to your main theme.

Q. That is what they call the structure?

A. That is the structure of your song. You build around your structure, so you accent your main theme.

Q. And in this particular song the theme is contained in one bar?

A. No, sir. It is in two bars—six bars.

Q. All right now, aren't those bars repetitious? That is what I want to find out.

A. Yes.

Mr. Ruiz: They are. Very well.

The Court: We might stop at this time and take the afternoon recess, Mr. Ruiz.

Mr. Ruiz: Yes.

(Recess.)

The Court: Go ahead.

Q. (By Mr. Ruiz): (Playing notes on violin.)

(Testimony of Mildred Becker Schultz.)

I believe it is your testimony that you claim your originality, Mrs. Schultz, is in the combination of the notes and the beat to create an effect, is that correct? [86]

The Witness: Would you repeat it, sir?

Mr. Ruiz: Mr. Reporter, would you read the question?

(Pending question read by the reporter.)

A. Yes, sir.

Q. And it's in the sequence of notes that go like this, is it not true?

(Mr. Ruiz plays notes on violin.)

A. No. It isn't.

Q. All right now, will you repeat just what it is?

A. You didn't play it properly, sir.

Q. Pardon?

A. You didn't play it properly.

The Court: She said you didn't play it properly.

(Mr. Ruiz plays notes on violin.)

A. No. That is an a-natural in there.

Q. That is the one that is in the other song?

A. The A is naturalized there instead of flat. May I ask what key you are playing that in there, sir, so I will know what I am talking about?

Q. And is that natural note in "The Blacksmith Blues"? A. Is the A natural?

Q. (Mr. Ruiz plays notes on violin.) Is that in "The Blacksmith Blues"?

(Testimony of Mildred Becker Schultz.)

A. Yes, the a-natural is in "The Blacksmith Blues."

Q. All right. In yours it doesn't have that, does it? [87] A. No; it hasn't.

Q. So with respect to the six notes we are talking about, one of the notes is different in "The Blacksmith Blues" from the note that you are referring to in "Good Old Army"?

A. It is the same note, sir, but played a little higher.

Q. It is the same note only it isn't?

A. It is the same note, but there is a difference between sharp and flat. An A is an A.

Q. Very well. Then it is a note with a different tone?

A. It would still strike A, but it would be a little higher on the A.

Q. That is correct. You don't have that little note that is a little higher in your six notes, do you?

A. No, I don't.

Q. In your six notes it is the same one, isn't it?

A. In my song it is written in the key of E-flat.

Q. Well, irrespective of what key it may be in or whether it is A or whether it is G, irrespective of the key, now I am trying to get the tone sequence, and the question is, in your particular song, it is the same note instead of a natural?

A. It's a flat instead of a natural.

Q. Well, would it be (playing notes on violin).

A. In which song, sir?

Q. In the Army song? [88]

(Testimony of Mildred Becker Schultz.)

The Witness: Now, would you play it again?

(Mr. Ruiz plays notes on violin.)

A. Well, that would be either a-flat or a-natural; or no—it wouldn't be—yes, it is, a-flat.

Q. (By Mr. Ruiz): All right. Those are the same notes, aren't they?

The Witness: Would you play the different song? Well, I am not asking questions.

Mr. Hoppe: Why don't you ask her to sing it? I think she can do it easier.

Q. (By Mr. Ruiz): (Playing on violin.) The first two notes are the same, are they not?

A. Yes.

Q. (Playing notes on violin.) The next two notes are the same? A. Yes.

Q. And what are the next two notes, then?

A. An A and a B.

Q. All right. Now, you sing the six notes.

(Playing notes on violin.)

A. (Singing.) "Workin' for The Army"—

Q. (Playing notes on violin.) Is that it?

A. You haven't got the right—could you try it on the piano, Mr. Ruiz? It is a little hard on the violin.

Q. (Playing notes on violin.) [89]

A. That is closer to an a-flat.

Q. Is that yours?

A. Yes, it is closer to it, but it isn't it exactly.

(Testimony of Mildred Becker Schultz.)

Q. Well, I will try to read it again (Mr. Ruiz plays notes on violin).

A. That's mine only your B is flat.

Q. That is yours, is it? A. Yes.

Q. Is that correct? A. Yes.

Q. Now, how does the other one go?

A. Play it the same way, only move your third finger a half note higher.

Q. (Mr. Ruiz plays notes on violin.)

A. No. That is way up.

(Mr. Ruiz plays notes on violin.)

The Witness: Now you got it.

Q. (By Mr. Ruiz): All right now, we got the differentiation. (Playing notes on violin.) That is one, isn't it?

A. Well, if we are getting technical, the third note was a little off.

Q. All right. I am trying my best to try to hit it. I will try it again (playing notes on violin). Is that close enough?

A. Now I am mixed up. I am sorry, sir. [90]

Q. Now, with respect to the beat——

A. Yes:

Q. ——and the combination, it's a long one, a short one, (playing notes on violin), is that the swing (playing notes on violin), is that the beat you are talking about?

A. Yes, only it is a little fast (humming).

Q. Now, that is the beat that you claim originality to, isn't it (humming), is that it?



(Testimony of Mildred Becker Schultz.)

A. Well, that is original with me.

Q. All right. Now, have you ever heard this song before (playing on violin)?

A. Yes; I believe I did.

Q. (Playing violin.) Have you ever heard that song before?

A. It seems to me it goes—I believe I heard it. That isn't "Camp Town," is it?

Q. No. That is an old German folk song, a Schuhplattler song; have you ever heard that tempo played exactly the same way before? Have you ever heard it before, that is the question?

A. It sounds familiar to me.

Q. Now, if it is the same as your particular beat, would you still claim you originated that particular beat?

A. Well, I don't know what is in the other song, but I know that mine came to me—— [91]

Q. While you were walking?

A. ——while I was walking.

Q. That is why you claim it is original, because it came to you while you were walking, in that particular fashion?      A. That's right.

Mr. Ruiz: That is all.

Mr. Rudin: Will the clerk mark this. Your Honor, I have an old piece of paper here, but I am only introducing it, counsel, for the last three bars.

Mr. Hoppe: What is this?

Mr. Rudin: Just forget what is on top of this.

Mr. Hoppe: What is it?

Mr. Rudin: Just three bars of music.

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: Well, what is it?

Mr. Rudin: I will identify it. I just want it marked for identification.

Mr. Hoppe: Oh, all right.

The Court: Defendants' Exhibit B.

The Clerk: Defendants' Exhibit B marked.

(Said document was marked as Defendants' Exhibit B for identification.)

Q. (By Mr. Rudin): Mrs. Schultz, I direct your attention to the last three lines here, and I am going to ask Mr. Wolff to play something on the piano and I want you to tell me if in your opinion he is correctly playing what is [92] notated here?

The Witness: You mean these three lines is what he is going to play?

Mr. Rudin: That is right.

(Mr. Wolff plays piano.)

A. On this b-natural here it didn't sound proper.

(Mr. Wolff plays on piano.)

The Witness: That is a flat, isn't it, B-flat?

(Mr. Wolff plays on piano.)

Mr. Rudin: Would you like him to play it again?

The Witness: Would you, please?

(Mr. Wolff plays on piano.)

The Witness: I am lost because you hit the F sharp.

(Testimony of Mildred Becker Schultz.)

Could you take it from the last four bars, Mr. Wolff?

(Mr. Wolff plays on piano.)

A. Well, it sounded like it, excepting the last F, it didn't sound like an F.

Mr. Rudin: The bar, Mr. Wolff.

(Mr. Wolff plays on piano.)

Mr. Wolff: That is an F natural there; there is no sharp.

(Mr. Wolff plays on piano.)

A. It sounds like it to me.

Q. (By Mr. Rudin): That seems to be correct?

A. Yes. [93]

Q. Does the music sound at all familiar to you, aside from the syncopation of the beat?

A. It's just running around a scale. It doesn't strike any—I don't remember it.

Q. It doesn't sound at all familiar to you?

A. I don't know what it is unless it is a syncopation changed on some other song I should know.

Mr. Rudin: Well, would you try to play that with a little syncopation, Mr. Wolff?

(Mr. Wolff plays piano.)

The Witness: It's changing the syncopation, isn't it?

Q. (By Mr. Rudin): Well, the syncopation—the same notes, isn't it? A. Yes.

Q. Does that sound familiar to you?

(Testimony of Mildred Becker Schultz.)

A. It does.

Q. What does it sound like?

A. It sounds something like "The Blacksmith Blues."

Q. Something like it?           A. Yes.

Mr. Rudin: May we have this marked in evidence, your Honor.

The Court: Yes.

Mr. Hoppe: Well, no, not in evidence, because we don't know what it is. [94]

Mr. Rudin: It is just some music, your Honor.

The Court: Yes, I will let it be received. I will overrule the objection, on the statement of counsel.

Mr. Rudin: B.

The Clerk: B in evidence.

The Court: B in evidence.

Mr. Rudin: It is just for the purpose of identifying her testimony.

(Said document was received in evidence and marked as Defendants' Exhibit B.)

Mr. Rudin: No further questions. Thank you.

The Court: Does Mr. Hoppe have any further question?

Mr. Hoppe: Yes.

The Court: You don't want Mr. Wolff at the piano any more?

Mr. Rudin: No, no. That was one of his qualifications when he came to our office, your Honor; he had to play a piano.

(Testimony of Mildred Becker Schultz.)

### Redirect Examination

By Mr. Hoppe:

Q. Mrs. Schultz, with reference to the envelope which was marked Exhibit A, which I believe you testified was the only thing that you could recall which you sent in the mails, do you know of your own knowledge whether—you said it was closed when you received it? A. Yes, sir. [95]

Q. Do you know the envelope had been opened or not between the time you mailed it and the time you received it? A. I do not know, sir.

Mr. Hoppe: You do not know.

Mr. Rudin: May I consult with counsel for just one moment?

The Court: Yes.

Mr. Rudin: It might save some time.

(Intermission.)

Q. (By Mr. Hoppe): Did you receive other things in the mail that pertained to your music?

A. Yes, sir.

Q. And did you call my attention, Mrs. Schultz, during the recess to Plaintiff's Exhibit 12 for identification, which is a Publishing Agreement and Royalty Contract form dated May 29th, 1942, between Mildred Becker and Westmore Publishing Corporation, but not signed by you, and Plaintiff's Exhibit 13, which is the carbon copy of Exhibit 12 for identification, and Plaintiff's Exhibit 14, which is a letter from Stephen M. Janik to you, and Plain-



(Testimony of Mildred Becker Schultz.)

tiff's Exhibit 15, which is a letter dated November 2, 1949, from Lou Levy to you?      A. Yes.

Q. Did you ever show your music to Westmore Music [96] Corporation?

A. No, sir. I never heard of it.

Q. Did you ever show your music to Stephen Janik?

A. I don't even know who the gentleman is.

Q. And did you ever show your music to Lou Levy?      A. Yes, sir. I gave it to him.

Q. Who is Mr. Levy?

A. I presume that he is Maxine Andrews' husband.

Q. Do you know who he is?

A. Yes, I do know who he is.

Q. And who is he?

A. He is Maxine Andrews' husband.

Q. And did you receive all of these enclosures in the mails?      A. Yes, sir; I did.

Mr. Hoppe: We offer in evidence, your Honor, Plaintiff's Exhibits 12, 13, 14 and 15.

Mr. Rudin: There's no possible relevance to any of the issues in this case. At the time the contract was given, maybe they wanted some money to publish her song. The letter from Levy has nothing to do with the issue. Mr. Levy is not a defendant. Mr. Levy, whoever he may be, is not a defendant.

Mr. Ruiz: I object to them on the grounds they are immaterial and irrelevant. [97]

Mr. Rudin: It merely shows a submission to Leads Music Corporation. It was rejected. She

(Testimony of Mildred Becker Schultz.)

doesn't know these other people. The publishing agreement was never signed.

The Court: I will let them speak for themselves. I will overrule the objection. Let them be received.

Mr. Hoppe: Thank you, your Honor.

The Clerk: Twelve, 13, 14 and 15 in evidence.

(Said documents, so offered and received in evidence, were marked as Plaintiff's Exhibits 12, 13, 14 and 15.)

Mr. Hoppe: No further examination.

The Witness: Am I free?

Mr. Hoppe: That is all.

The Court: Yes. You may step down.

Mr. Hoppe: Your Honor, the plaintiff rests.

(Whereupon, the Plaintiff rested her case in chief.)

Mr. Rudin: Your Honor, may we have just one moment to confer?

The Court: Certainly.

(A short intermission.)

Mr. Ruiz: If the Court please, the defendants that I represent will call as their first witness Mr. George G. Schneider.

The Court: Mr. Schneider. [98]

GEORGE G. SCHNEIDER

called as a witness herein on behalf of certain defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

A. George G. Schneider.

Direct Examination

By Mr. Ruiz:

Q. What is your name, sir?

A. George G. Schneider.

Q. What is your occupation?

A. Music research.

Q. How long have you been engaged in that occupation? A. Approximately 30 years.

Q. Does that include the study of music and its sources? A. Pardon me?

Q. Does that include the study of music and its sources? A. It does.

Q. Do you hold any degrees from any institutions? A. I do.

Q. And what degrees do you hold?

A. Bachelor of Arts.

Q. Bachelor of Arts. Do you have any honorary degrees?

A. Honorary Doctor of Music.

Q. And from what university is that?

A. Berlin, the University of Berlin.

Q. Have you studied extensively, music? [99]

A. I have.

Q. Do you play any instruments?

(Testimony of George G. Schneider.)

A. I have.

Q. In connection with your studies?

A. Yes, sir.

Q. Will you please say those instruments?

A. Piano, organ, trumpet.

Q. Have you ever prepared any studies, theses, have you ever prepared any writings in connection with music?

A. Only for school papers and library journals.

Q. Have you ever been engaged by motion picture companies in connection with the music work that they do?

A. I have.

Q. And will you please name them?

A. Metro-Goldwyn-Mayer Studios, for 27½ years.

Q. Have you ever been employed by Paramount Studios?

A. Only in a plagiarism case.

Q. In the plagiarism field?

A. Yes, sir.

Q. Have you ever testified in court before?

A. No, sir.

The Witness: Will you excuse me, please, your Honor. I just got new dentures.

The Court: That is all right.

The Witness: Please excuse me. I have to press them down [100] every once in awhile. I am sorry.

Q. (By Mr. Ruiz): I will show you some sheet music and ask you if you have ever seen this sheet music before?

A. I have.

Q. Did you prepare it?

A. I had it prepared.

Q. Under your supervision?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. And will you state for purposes of the record what it is?

A. It is what we call a comparison chart of the thematic material.

Q. Of the thematic material of "Happy Pay Off Day"?

A. And "The Blacksmith Blues," "Good Old Army" and "Waitin' for My Baby."

Mr. Ruiz: May I have this marked as the first exhibits for defendant Tune Towne Tunes and the clients that I represent, for identification?

Mr. Rudin: Your Honor, why don't we just call it Exhibit C?

Mr. Hoppe: Why don't we just follow right along?

The Court: Very well.

The Clerk: That will be Defendants' Exhibit C.

(Said document was marked as Defendants' Exhibit C, for identification.) [101]

Q. (By Mr. Ruiz): In connection with this exhibit being, would you say, a comparative analysis of those four musical compositions?

A. I would, of the thematic material of the four musical compositions.

Q. Now, what is thematic material?

A. It is usually considered the melodic line.

Q. The melodic line?           A. Yes, sir.

Q. Now, does the thematic material that you have compiled contain the entire musical composi-



(Testimony of George G. Schneider.)

tions from beginning to end insofar as the chorus is concerned of the four musical compositions that you have made reference to?

A. With the exception of the last eight bars of "Waitin' for My Baby," and I did not have access to it, but since this was compiled I am satisfied that we have sufficient from the introduction, in other words, the last eight bars of "Waitin' for My Baby" are primarily the same as the first eight bars. Otherwise, we have all of the material of the choruses.

Q. We have some records. Now, I am going to play for you Plaintiff's Exhibit 10, entitled "Happy Pay Day," by Sonny Burke and His Orchestra, all the way through, but inasmuch as it is from a record I wish you would [102] indicate to me when it has gone through the entire chorus from the beginning of the chorus to the end as you have depicted it in this comparative analysis? Will you kindly do that for me?

(Said record was played.)

(The witness snaps his fingers.)

Very well.

Now, I notice that you snapped your fingers and I will stop it now and will you indicate what you meant by the snap of fingers?

A. He interpolated something.

Q. And that was strange to anything that appears in any of the songs, inclusive of——

(Testimony of George G. Schneider.)

A. Yes, sir; up to that point.

Q. And that is something that is different, inclusive of the Army Song and "Waitin' for My Baby"?      A. That is right, yes, sir.

Q. All right now, I will do the same thing to "The Blacksmith Blues," being Plaintiff's Exhibit 11.

(Said record was played.)

(The witness waves his left hand.)

Mr. Ruiz: Very well.

Q. Now, what has been played on this record is what you have in its entirety there with respect to "The Blacksmith Blues" in your comparative analysis, is that correct?

A. There is more on the record up to the point that I [103] stopped you, there was the introduction that I do not have here.

Q. You do not have the introduction?

A. No, sir.

Q. Insofar as the chorus is concerned, it is all there, is that correct?      A. Yes, sir.

Q. Now, for your comparative analysis did you examine Plaintiff's Exhibit 2 in evidence, which is Exhibit 1 in the First Amended Complaint of the plaintiff in the action, and, likewise, place the notes with the values as therein set forth and in the sequence and beat therein depicted and make it a part of your comparative analysis?

A. I never saw this copy, sir, nor a facsimile

(Testimony of George G. Schneider.)

of the lead sheet with the lyrics. I had a full piano part.

Q. You had a full piano part of which, of Exhibit 2 that I am referring to here?

A. Of this exhibit, of this (indicating).

Q. Yes.

A. It has been exhibited—it has been entered.

Q. Now I am showing you Plaintiff's Exhibit 3 in evidence, which is called "Good Old Army," by Mildred Becker of Redwood City, California, and ask you if you have ever seen that piano copy?

A. I have seen a facsimile of it, sir. [104]

Q. And by facsimile you mean the same copy——

A. Yes, sir.

Q. ——only reprinted? A. Yes, sir.

Q. Now, I will ask you the question, is that the song you copied there in this work that you have prepared—— A. It is, sir.

Q. ——by way of comparative analysis?

A. Yes, sir.

Q. And it is note for note, it is the same piece, in other words? A. Yes, sir.

Q. Very well. I will call your attention to Exhibit 8 in evidence, being Exhibit 2 in the Complaint, "The Blacksmith Blues," recorded by Ella Mae Morse, and ask you if you have seen this musical composition before? A. I have.

Q. And I will ask you the question if in your comparative analysis you have likewise set that forth, note by note as it is written on that sheet music by way of exhibit in this courtroom?

(Testimony of George G. Schneider.)

A. I have.

Q. Very well. Now, I think we have one more, "Waitin' for My Baby."

Mr. Wolff: 5 and 6. [105]

Mr. Ruiz: 5 and 6. Thank you.

Q. Now, I will call your attention to Exhibits for plaintiff, respectively 5 and 6, and ask if you likewise copied those from this matter that you compared and prepared by way of comparative analysis?

A. I have never seen (indicating)——

Q. Referring to Exhibit 5.

A. I have never seen that one (indicating). I have a photostatic copy of that (indicating), and I have used that (indicating).

Q. Referring to Plaintiff's Exhibit 6, is that correct?

A. Correct, with the exception of the last eight bars which I did not have on my copy.

Q. And those are the eight bars that you just made reference to a little while ago?

A. Yes, sir.

Q. Very well. Now please tell us what you have done there?

A. I have noted the four compositions and to the best of my ability have tried to put the corresponding notes beneath each other irrespective of their time values and have drawn lines indicating where there is a definite similarity and where there is a definite dissimilarity.

The similarities are noted by the broken line be-

(Testimony of George G. Schneider.)

tween "The Blacksmith Blues" and "Good Old Army."

The dissimilarities are noted by the solid line between [106] "The Blacksmith Blues" and "Good Old Army" throughout the four pages.

Q. Now, for purposes of the record, will you please indicate how many bars there are in the chorus to "Good Old Army"?

A. In the published——

Mr. Ruiz: In——

The Witness: As I have it here?

Q. (By Mr. Ruiz): As you have it here.

A. 32 bars.

Q. I see. And how many bars are there in "Waitin' for My Baby"?

A. "Waitin' for My Baby" also?

Q. Yes, sir.

A. "Waitin' for My Baby" is really a 16-bar repeated.

Q. Repeated? A. Or a 32-bar chorus.

Q. A 32-bar chorus. And how many bars are there in "The Blacksmith Blues"?

A. "The Blacksmith Blues" is a 16-bar chorus repeated.

Q. 32 bars altogether? A. 32 bars.

Q. And how many bars are there in "Happy Pay Off Day"?

A. "Happy Pay Off Day" or "Happy Pay Day"—I copied "Happy Pay Off Day"—[107]

Q. Yes.

A. —has an additional 2 bars at the end of



(Testimony of George G. Schneider.)

the original 16 and also at the end of the composition, so that in reality we would have 36 bars altogether. However, those 2 bars might be considered lead-in notes just the same as in "Waitin' for My Baby" and we have 2 notes leading into the chorus that are not figured as part of the chorus.

Q. Now, in the 32 bars of "The Blacksmith Blues" and the 32 bars of "Good Old Army" and the 32 bars of "Waitin' for My Baby," in your comparative analysis how many notes did you find to be the same notes with respect to sequence?

A. In the first bar of the two compositions, out of the six notes that we have in "Good Old Army," there is one that is not in "The Blacksmith Blues"; in other words, our fifth note in "Good Old Army" is A-flat, whereas, in "The Blacksmith Blues" it is an A-natural.

In the second bar, it's 50-50. The second bar of "Good Old Army" is practically a repetition, practically a repetition of the first bar; whereas, the second bar of "The Blacksmith Blues," there is a decided variation.

Q. Now, will you continue with the bars thereafter, so that we may have this down?

A. In bar 3 there are only two notes that are the same and yet they are different in that they are octaves.

In bar 4 we have transitions, so that we could say [108] there is one note that is the same in both compositions.

In bar 5, no comparison; in bar 6, no compari-

(Testimony of George G. Schneider.)

son; in bar 7, no comparison; in bar 8, no comparison; and then for our next eight bars we have practically a repetition of the same thing.

Q. Now, did you hear Mr. Wolff play the piano?

A. Yes; I did.

Q. Did you recognize what he played?

A. I did.

Q. What did he play?

A. It's an old, very old trumpet exercise. It isn't Charlier, but it's something like that. A man wrote a "tutor" for various instruments, exercises for the development of the embouchure and also for rhythm.

Q. And was that exercise note for note practically "The Blacksmith Blues"?

A. It was so reminiscent that I don't want to say yes; I don't want to say no.

Q. Well, now, reminiscent, I don't know what you mean by that?

Mr. Rudin: The last three bars.

Mr. Ruiz: The last three?

The Witness: The last three.

The first 4 bars are definitely note for note.

Q. (By Mr. Ruiz): The first four bars are definitely note [109] for note? A. Yes.

Q. Of what song?

A. "The Blacksmith Blues."

Q. And what is the name of the song that you have made reference to?

A. It was not a song.

Q. The musical exercise?

(Testimony of George G. Schneider.)

A. It was an exercise.

Q. And what is the name of it?

A. Something like "Charlier," C-h-a-r-l-i-e-r.

Mr. Rudin: C-h-a-r-l-i-e-r.

Mr. Ruiz: Theo. Charlier?

A. That is it. Theodore.

Q. Theodore. Now, "Good Old Army" or "Waitin' for My Baby," do either one of those songs follow the sequence of notes that you have just made reference to as contained in the first four bars of that musical exercise?

A. No. They don't.

Q. I will show you another piece of paper that has some musical notes on it and ask you if you have ever seen that before?

A. I have.

Q. Was that prepared by you?

A. It was. [110]

Mr. Ruiz: And under your supervision.

I would like to have this marked for purposes of identification as the next letter of the defendants.

The Clerk: Defendants' Exhibit D marked.

(Said document was marked as Defendants' Exhibit D for identification.)

Q. (By Mr. Ruiz): Now, will you please state what this represents?

A. This is a comparative chart showing sources of melodic theme of "Good Old Army," all taken from public domain sources.

Q. And how many public domain sources did you find in that chart that you have prepared?

(Testimony of George G. Schneider.)

A. I put down eleven. That is all I had room for on the page.

Mr. Ruiz: At this time I would like to offer into evidence Defendants' Exhibit C and Defendants' Exhibit D, respectively.

The Court: All right. They may be received.

Mr. Hoppe: Your Honor, they are being received in evidence for the limited purpose of illustrating his testimony?

The Court: That is right.

Mr. Hoppe: Rather than proving the facts?

The Court: That is right. [111]

(Said documents were received in evidence as Defendants' Exhibits C and D, respectively.)

The Court: It is 4:00 o'clock now, Mr. Rudin. We might as well adjourn, because they will want to cross-examine him.

Mr. Rudin: Yes.

The Court: Do you gentlemen want to start at 9:30 and run to 12:00, or do you want to start at 10:00 and run to 12:30? I will do it either way you want to. Which is best?

Mr. Ruiz: 10:00 to 12:30 would be best for me.

The Court: What time do you have to be at El Monte, 2:00 o'clock?

Mr. Rudin: 2:00 o'clock.

The Court: You will go right from here, then?

Mr. Rudin: Yes.

The Court: If we run until 12:30, that will give

(Testimony of George G. Schneider.)

you time to get out there? You will take the Freeway out there?

Mr. Rudin: Oh, sure.

The Court: So we will run from 10:00 to 12:30 tomorrow.

Mr. Rudin: Maybe we can get through tomorrow.

The Court: We have to be here anyway. 10:00 o'clock tomorrow and we will run until 12:30. Then there will be no afternoon session; you understand that?

Mr. Hoppe: Yes.

(An adjournment was thereupon taken until the following day, Wednesday, September 18, 1957, at 10:00 a.m.) [112]

Wednesday, September 18, 1957—10:00 A.M.

The Court: Mr. Wolff, I understand Mr. Rudin may not be here?

Mr. Ruiz: Mr. Schneider, will you take the stand, please?

The Clerk: He was sworn yesterday.

The Court: Yes; the witness was on the stand when we adjourned yesterday.

Mr. Ruiz: That is correct.



## GEORGE G. SCHNEIDER

resumed the stand on behalf of defendants and testified further as follows:

## Direct Examination

(Continued)

By Mr. Ruiz:

Q. Mr. Schneider, you were in the courtroom yesterday when Mrs. Schultz stated in substance that the bouncing effect of tonal couplets made up of a dotted eighth and a sixteenth, notes, was an original effect; do you recall that?

A. Yes, sir.

Q. And, by way of illustration, she was interrogated concerning that sequence of time as follows:

(Mr. Ruiz plays violin.)

Can you hear me? A. Yes. [115]

Q. (Mr. Ruiz plays violin): Now, with respect to the research that you have done and predicated upon your experience as a musicologist, can you give us your studied opinion as to whether that effect, that bouncing effect which she described as syncopation is original or is it something that has been in the musical field for some time?

A. It has been in the musical field for hundreds of years.

Q. And by way of illustration I play this particular musical composition. I want you to listen and see if you can tell me what it is? (Mr. Ruiz plays on violin.) Now, have you ever heard that before?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. Will you please state for the record what it is?

A. It is a composition by Louis Ganne, called "La Czarina," Louis Ganne, a Frenchman, and he took it from the basic melody from an old Bavarian Schuhplattler which is practically the same. The opening bars are the same.

Q. Now, you observed Mrs. Schultz as she walked up and down in the courtroom here, did you not? A. Yes, sir.

Q. I noticed that you stated the "Schuhplattler." What is a Schuhplattler?

A. A shoe dance.

Q. A shoe dance?

A. A shoe dance; that is the simplest definition I can [116] give. Sometimes they are called Peasant Dances.

Q. Now, will you please examine Defendants' Exhibit C, which is the comparative analysis that you have heretofore testified to, and more particularly the notes of the alleged infringing composition, "Happy Pay Off Day," and tell me whether throughout its 32 bars there are any couplets whatsoever?

The Witness: May I ask you to define what you mean by couplet?

Q. (By Mr. Ruiz): Two notes succeeding each other that are on the same tone. I am referring you to "Happy Pay Off Day."

The Witness: Yes, sir.

(Testimony of George G. Schneider.)

Q. (By Mr. Ruiz): Now, will you examine all of the notes on "Happy Pay Off Day" and tell me whether there are any two notes that follow one another in that particular composition?

A. Yes, sir; there are.

Q. How many?

A. In bar 11 and in bar 27 which is a repetition of 11 we have the same repeated phrase.

Q. Now, you are making reference to two notes that are E, is that correct?      A. E-flat, sir..

Q. E-flat? [117]

The Witness: There is a difference between E and E-flat.

Q. (By Mr. Ruiz): And you heard the testimony of Mrs. Schultz to the effect that when you referred to a flat it was in effect the same note, is that true?

A. I did, sir. It is not true.

Q. It is not true. So, out of those 32 bars there is one note that is repeated?      A. Twice.

Mr. Ruiz: Twice. That is all, with respect to that.

Mr. Hoppe: Mr. Ruiz, just to save me a little time, would you have him number bar 11 and number bar 27 in that exhibit?

The Witness: If you please, sir, they are numbered.

Mr. Rudin: They are numbered.

Mr. Hoppe: Oh, yes. I beg your pardon.

Mr. Rudin: Apparently they are all numbered.

Mr. Hoppe: I was not perceptive.

(Testimony of George G. Schneider.)

Q. (By Mr. Ruiz): Do the sequence of notes which appear in the first bar and repeat in the second bar in the introductory phrase to the compositions "Good Old Army" and "Waitin' for My Baby," and I am speaking of the sequence of notes without the bounce, likewise appear in other musical compositions which are in the public domain?

A. Yes, sir.

Q. I am calling your attention to Defendants' Exhibit D, [118] Mr. Schneider, and particularly in the analysis that you have made there, you have referred to that before, have you not?

A. Yes, sir.

Q. Did you invite counsel for the plaintiff to your home last night?

A. I invited him to my office, sir.

Q. And was it with respect to having him check the sources concerning this particular analysis that you have made?

A. It was, sir.

Q. And did you have discussions with him concerning those sources?

A. I pointed out to him the sources and we discussed the way I had prepared them.

Q. Now, with respect to the manner in which you have prepared that particular analysis, I notice that what you have placed down there is all in one key, is that correct?

A. It is, sir.

Q. Have you transposed these into one key for any particular purpose?

A. Yes, sir.

Q. Will you please state that purpose?

A. For easier reading for non-musicians, for



(Testimony of George G. Schneider.)

purposes of comparison by the placement of the notes; whereas, they [119] might sound the same to the ear played in different keys, they appear better when they are written in the same key. I have not changed the tonality at all, that is, the tonal progression at all.

Q. The sources themselves from which you have repeated in this particular exhibit may be in other keys and are in other keys, are they not?

A. Practically every one of them was, yes, sir.

Q. And, therefore, the changes from the sources are changes that are made of necessity as a consequence of your simply putting them into the same key, is that it? A. That is right, sir.

Q. And, as I understand your testimony to be, that from a listener's point of view the sequence of notes are the same—— A. Correct

Q. ——as the sequence of notes from, I believe you put on top there that you compared it with "Good Old Army"?

A. "Good Old Army," yes, sir.

Q. Very well, sir. Now, will you please go to the piano and show us audibly what you have done there?

A. Do you want me to play them in the original notes or the way I have got them?

Q. No. Pardon me. I will ask you one question:

As far as tones are concerned and sequence of tones, irrespective of what key they may be, since you have placed [120] them all in one key, in substance it is the same thing, isn't it?



(Testimony of George G. Schneider.)

A. Yes, sir.

Mr Ruiz: Very well.

The Witness: Shall I announce the composition?

The Court: Yes. You better do that.

Mr. Ruiz: You can use one finger. It is all right.

The Witness: This is "Good Old Army" (the witness plays piano). The first illustration is an old French drinking song, "Entendez Vous Le Carillon Du Verre" (playing piano).

The next one is Stephen Foster's "Old Black Joe" (witness plays piano).

The next one is from Hymnes of the French Revolution (playing piano).

The next from "Piano Concerta No. 1" (witness plays piano).

The next from Dvorak's "Violin Concerto" (witness plays piano).

The next from Beethoven's "Trio," for clarinet, cello and piano playing (witness plays piano).

The next from "Forellen Quintet," by Schubert (witness plays piano).

The next, "The Marine's Hymn" (witness plays piano).

The next, the source of "The Marine's Hymn," from [121] Genevieve de Brabant, by Offenbach (witness plays piano).

The next is an old German folk song, "Zum Letzten Mal" (the witness plays piano).

The next, by Sievert, "Goldene Burschenzeit" (the witness plays on piano).

(Testimony of George G. Schneider.)

Mr. Ruiz: I think you may resume the stand. You can bring the exhibits with you.

(The witness returned to the witness stand.)

Q. Now, Mr. Schneider, is it your testimony, then——

Mr. Hoppe: Now, let us not lead the witness, Mr. Ruiz.

Q. (By Mr. Ruiz, continuing): ——that in addition to the bouncing effect to which we have heretofore referred, that there is nothing new in the sequence of the notes?

Mr. Hoppe: I object to the leading form of the question, your Honor. That has not been his testimony; and the demonstration on the piano demonstrated conclusively that there was no similarity between the pieces.

The Court: I will overrule the objection.

Mr. Ruiz: Will the reporter read the question?

(Pending question read by the reporter.)

A. It is my testimony there is nothing new in the sequence of the opening phrase of the song.

Q. And when we are referring to "Good Old Army" and "Waitin' for My Baby," we are specifically referring to the opening phrases of the chorus of those songs, are we [122] not?

A. I am, sir.

Mr. Ruiz: That is all.

(Testimony of George G. Schneider.)

Cross-Examination

By Mr. Hoppe:

Q. Now, Mr. Schneider, I would like to examine you first on your chart, which is Defendants' Exhibit D.           A. D.

Q. And bears the Roman numeral III on the top, Exhibit D, and has 12, what do you call those musical scores on it, what is the technical expression of these lines that go across?

A. There are twelve themes.

Q. And it has twelve themes on it. Now, turning to the last part of your testimony, do I understand your testimony to be to the effect that those opening themes in all of those twelve pieces are the same musically?

A. The sequence of notes, the opening notes are the same in all of them, the intervals between the notes, or as we call it, the sequence.

Q. Now, turning to the top theme, which is from "Good Old Army," on the lowest line there appear a note with one tail on it, a dot, and a note with two tails on it. What is that note called, to a musician?

A. The note there is E-flat and the first one is a dotted [123] quarter—a dotted eighth. Excuse me. The second one is a sixteenth.

Q. Now, in the next song, which is the French song, the first note is also on a line and it has no tail on it. To a musician what is that note?

(Testimony of George G. Schneider.)

A. It is E-flat and it is a quarter note.

Q. And on the next one, what is the corresponding note? A. E-flat, a quarter note.

Q. And that same thing would be true, would it not, of the "Piano Concerto," line 5?

A. You skipped one, didn't you, sir?

Q. Well, I want to get all that are the same, to shorten this, Mr. Schneider.

A. Excuse me, please. Yes, sir.

Q. That would be true in line 5, the "Piano Concerto," true in line 6, the "Violin Concerto"; is that true in all E-flats, notes?

A. They are E-flats, quarter notes.

Q. All right, now, in line 4, what is the corresponding note? A. E-flat.

Q. And what size note is that?

A. A half note.

Q. Now, in line 7, which is the "Trio," and line 8, which is the "Forellen Quintet," and in line 11, which is "Zum Letzten," and in line 12, which is the "Goldene [124] Burschenzeit," those are all the same notes, are they not? A. E-flats.

Q. E-flats, and what size notes?

A. Eighth notes.

Q. And in line 9, "The Marine's Hymn," what size note is that? A. A dotted eighth.

Q. E-flat, a dotted eighth note.

Now, so that we can have a common term of lawyer's vocabulary and musician's vocabulary, can you give me a generic expression, I don't care if it is a musician's expression or whatever it is, that

(Testimony of George G. Schneider.)

we can use to define this theme the commonest, in the theme that you played over there? Can we call it the representative theme?

A. A progression, a progression of notes.

Q. All right, let us call it the representative progression of notes, so we will know what we are talking about.

A. That is characteristic of these compositions.

Q. Now, I am going to write this down so that any time that we use the word "representative"—

Mr. Ruiz: If the court please, the attorney said "representative."

Mr. Hoppe: Well, you use any name you want to, Mr. Ruiz.

Mr. Ruiz: Just a moment, please. The witness testified [125] it was a progression of notes.

The Court: All right.

Q. (By Mr. Hoppe): There are different progressions of notes, are there not, Mr. Schneider?

A. Yes, sir.

Q. Would you give a word to this particular progression of notes, so that when you and I speak of this particular progression of notes, we are speaking about the same thing and there is no question about what vocabulary we are using?

A. This particular progression of notes is a triad based on do-mi-sol.

A. Triad based on do-mi-sol. Are there other triads based on do-mi-sol besides this one?

A. No, sir. Do-mi-sol is a basic triad. You can sing do in any key that you want to and then you



(Testimony of George G. Schneider.)

can get your mi from that and your sol from that and then your octave.

Q. All right. Then, if we call this a do-mi-sol triad it would be your testimony that the do-mi-sol triad is common to "Good Old Army" and common to all of these prior art pieces of music to which you called our attention?

A. Basically, yes, sir.

Q. All right. Now, you have a considerable library of music down at your place of business, do you not?

A. I have. [126]

Q. It is one of the most extensive in the United States, is it not?

A. A private library, yes, sir.

Q. Did you make a search in your library for do-mi-sol triads in which the first portion of the triad, the do part had this combination of notes which you have defined as an E-flat, dotted eighth and a sixteenth E-flat; did you make a search to see if you could find such music?

A. Not extensive, sir, no.

Q. Do you know of any now where that combination appears in a do-mi-sol triad?

A. The one that was played, the Mazurka, by Ganne.

Q. Which Mazurka?

A. The one that Mr. Ruiz played on the violin.

Q. That is not on your chart here, is it, Mr. Schneider?

A. No, sir. It is not.

Q. Do you have the music for that, so that we

(Testimony of George G. Schneider.)

can compare that music with this music that is in issue here?

A. I believe I have sufficient, if I can get to the briefcase for a moment.

Q. Yes, if you will, sir.

Mr. Rudin: Where is it? I will get it.

The Witness: The Dictionary of Musical Themes.

Mr. Rudin: Do you want it out of the dictionary, Mr. Schneider? [127]

The Witness: I believe I will get the original source.

Mr. Rudin: The original source. O.K.

The Court: Go right ahead now.

The Witness: This was known as "La Czarina," by Ganne (the witness plays on piano).

Q. (By Mr. Hoppe): Now, you are playing from a book entitled "Dictionary of Musical Themes," copyrighted 1948, page 193, and those are the—— A. G 20 A.

Q. G 20 A. Now, what is the value and the tone of the first note of this do-mi-sol triad?

A. Our E-flat.

Q. Our E-flat, and what size note is it?

A. That is an eighth note with a sixteenth rest.

Q. And is an eighth note with a sixteenth rest. What is the next note?

A. E-flat (the witness plays on piano).

Q. And what size note is it?

A. A sixteenth.

Q. Now, remember, Mr. Schneider, I am not a

(Testimony of George G. Schneider.)

musician, but I notice the first note has one tail and then the second note has three tails on it. Would that make them both a sixteenth? Now, going back we now have an eighth note?

A. An eighth note.

Q. A dotted sixteenth rest. [128]

A. A dotted sixteenth rest and a 1/32nd note.

Q. Now, what is the next size note, the third note?

A. The third note is an eighth note.

Q. An eighth note and what tone is it?

A. G.

Q. It's a G and then you have a rest, do you not, a dotted rest? A. A dotted sixteenth.

Q. A dotted sixteenth, and then you have a 32nd? A. A 32nd.

Q. A 32nd note. Now, the following note is——

A. E-flat.

Q. ——an E-flat. This is note number 5, you say, is an E-flat, and what size note is it, an eighth?

A. An eighth note.

Q. And then there is a dotted rest again?

A. A dotted——

Q. A dotted sixteenth rest?

Mr. Ruiz: Counsel, I don't mean to interrupt the cross-examination, but it seems to be getting down to a question of comparing the music from one book to another.

The Court: I will let him proceed. Go ahead.

Mr. Ruiz: All right.

(Testimony of George G. Schneider.)

Q. (By Mr. Hoppe): All right. We have a 32nd and a dotted [129] E-flat.

Now, turning back to the subject at hand, before you played this piece, are you aware of any do-mi-sol triad other than those on your chart here or any place——

A. Oh, there are many of them, sir.

Q. Just a minute. Wait until my question is concluded.

The Witness: I thought you had, sir.

Q. (By Mr. Hoppe, continuing): ——in which the do part of the triads comprises in this combination specifically an E-flat, a dotted eighth and a sixteenth? Now, you testified that this piece had that. Will you adhere to your answer, or would you like to change your answer?

The Witness: You have asked two different questions.

Q. (By Mr. Hoppe): All right. Let's find out first if you would like to change your answer that that piece of music you just had, had that specific combination of length of notes and rests and all that in the do part of the do-mi-sol triad?

A. It does.

Mr. Rudin: I object to the form of the question, your Honor. I don't have just exactly what portion you are referring to in which you are trying to impeach the witness, as to whether he wants to change his answer. Frankly, I find the question confusing and misleading.

Mr. Ruiz: I will help counsel. I will stipulate

(Testimony of George G. Schneider.)

that [130] the one that he referred to before had a dotted eighth and a sixteenth and when he went to the piano it was a sixteenth and a 32nd, if that is what you are trying to do.

Mr. Hoppe: Now, I want to find out whether the piece of music at the piano had the specific combination of an E-flat, a dotted eighth and an E-flat sixteenth note.

Mr. Ruiz: I will stipulate to that——

Mr. Hoppe: That it does not?

Mr. Ruiz: I believe it did.

Mr. Hoppe: That it did not?

Mr. Rudin: It speaks for itself, your Honor.

Mr. Ruiz: It was a sixteenth and a 32nd, that is it.

Q. (By Mr. Hoppe): Then the answer is no, that the piece of music did not have a combination of an E-flat, dotted eighth and a E-flat sixteenth?

Mr. Ruiz: The stipulation, your Honor, is a sixteenth and a 32nd.

The Court: All right.

Mr. Ruiz: If he wants that in evidence, I will so stipulate.

Mr. Hoppe: May I have the answer from the witness?

The Witness: The way it is printed?

Mr. Hoppe: Yes.

A. It does not have it. The way it is usually played, you couldn't tell whether it was an eighth note or a dotted [131] eighth, whether it was a sixteenth rest or a dotted sixteenth rest.



(Testimony of George G. Schneider.)

Q. (By Mr. Hoppe): Now, do you know of any piece of sheet music having the do-mi-sol triad in which the do part of the triad comprises, as written and as played, both, an E-flat dotted eighth and an E-flat sixteenth note?

A. I do not know offhand, no, sir.

Q. Now, in your exemplars of the do-mi-sol triad, the first one, the "Good Old Army," what are the notes in words that make up the mi part of the triad in "Good Old Army" on the line 1 of your chart, Exhibit D?

A. The third and fourth notes.

Q. And what are the values and the note names for the third and fourth notes on line 1 of Exhibit D?

A. The first note is a G. It is a dotted eighth note.

The second note is a G. It is a sixteenth note.

Q. Now, in a do-mi-sol triad—I am using it as you and I have used it in our examination so far—are you aware of any prior art music in which there appear for the mi part of the triad a specific combination of a G-dotted eighth and a G-sixteenth note?

A. Offhand, I do not.

Q. Now, Mr. Schneider, notes come in various tonal values, for one thing, do they not?

A. Yes, sir. [132]

Q. And they also come in various sizes, don't they, that is, length of note?

A. Yes, sir.

Q. Now, what different sizes do notes come in, each note? Let us take any note; let us take, for

(Testimony of George G. Schneider.)

example, A. Every note has the same number of sizes, doesn't it? A. It could have.

Q. What are the number of sizes that a note has?

A. Well, we have the whole note, which, for your information, is a note without any stem, it is a round note, it is not a solid note, and I have seen that graduated down to a 128th of a whole note.

Q. 1/128th?

A. Whether or not it goes any higher than that, whether it goes to 256th or not, I do not know.

Q. Now, in the music that we have heard played in this lawsuit so far, we have gone from a whole note down to a half—we haven't any whole notes, have we?

A. No, sir. I beg your pardon. We do have whole notes.

Q. We have whole notes?

A. We have whole notes in "Good Old Army" and in "Waitin' for My Baby."

Q. And then we have half notes?

A. We have, in both of them.

Q. And we have quarter notes? [133]

A. We have.

Q. And we have eighth notes?

A. We have.

Q. And we have sixteenth notes?

A. We have.

Q. And we have 1/32nd notes. You played a 1/32nd note over here on the piano. Do you not?

A. Oh, you mean in the exhibits?

(Testimony of George G. Schneider.)

Q. Yes, sir.

A. Yes, sir; yes, sir. Excuse me.

Q. Now, that means that so far we have run into 1, 2, 3, 4, 5, six different sized notes, is that not right?

A. So far.

Q. Now, is a  $1/32$ nd note played  $1/32$ nds as long as a whole note; is that what the  $1/32$ nd means?

A. Yes, sir.

Q. Those are time factors?

A. Yes, sir.

Q. How long in time is a whole note?

A. That depends upon the speed at which the composition is written. If we take the ordinary march, it is 120 beats to the minute, and that would be 120 for a quarter note.

Q. So the size of a whole note will vary for different compositions?

A. Yes, sir. [134]

Q. Now, in making this chart, Defendants' Exhibit D, some of the source material which you used was from books published in 1948 and 1949, is that right?

A. Yes, sir.

Q. And in going over this chart at your office yesterday, we noted, as was brought out in your examination, that in each case the prior art theme was transposed for purposes of enabling visual and auditory comparison with "Good Old Army"?

A. Yes, sir.

Q. And we also noted, did we not, that in some instances on the chart the scrivener or whoever prepared the chart had not given the notes the same values as they appeared in the original manuscript?

(Testimony of George G. Schneider.)

A. What we would call mistakes in spelling, musical spelling.

Q. You call them mistakes in spelling?

A. Yes, sir.

Q. That is, in some places it showed a note having one value and it should have had another value?

A. Correct.

Q. And in some places there were rests that were shown that were not shown in the original?

A. Correct.

Q. And in some places there were dots shown that were not [135] shown in the original?

A. But there was no change in the notation at all.

Q. Now, the earliest piece on Exhibit D, which uses the do-mi-sol triad, would be the number 4, the "Ode Pour La Paix" which was from the French Revolution?

A. "Entendez Vous" was before that, sir.

Q. "Entendez Vous," then, would be before that? A. Yes, sir.

Q. When was "Entendez Vous" originally written? A. Before 1800.

Q. Well, the French Resolution was, you remember we looked it up, 1789? A. Yes, sir.

Q. "Entendez Vous" was before then?

A. Yes, sir.

Q. Now, the only piece which you called to our attention in which the do part of the do-mi-sol triad comprises two notes was the piece which you just played on the piano, is that correct?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. When was that piece of music written?

A. I do not know the exact date, but the man that wrote it died in 1903.

Q. Out side of that piece of music, do you know of any——

The Witness: May I change that, please, [136] sir?

The Court: Yes, sir.

The Witness: 1923.

Mr. Hoppe: 1923.

Q. Now, outside of that piece of music, do you know of any other piece of music having the do-mi-sol triad in which the do part comprises two notes, of any value?

A. I cannot call them by name, but there are other pieces that I know of under the generic term "Schuhplattler."

Q. And that was the song that counsel played back here with a violin?

A. Along the same lines.

Q. Now, how old a piece is that Schuhplattler?

A. In the early 1800's. They are Austrian and Bavarian folk dances.

Q. Now, these various themes that you have shown us here on Exhibit D, did you show those themes to Jack Holmes? A. No, sir.

Q. Did you ever discuss them with Jack Holmes?

A. No, sir.

Q. Did you ever discuss with Jack Holmes the various source materials—— A. No, sir.



(Testimony of George G. Schneider.)

Q. ——— in which that theme might be found?

A. No, sir.

Q. Now, when counsel played the violin here, he plucked [137] the strings, did he not?

A. Yes, sir.

Q. When you pluck the strings, do they all have the same time value to them?

A. It depends on how he plucks them, sir.

Q. Now, when he plucked them, did they have the same length of time?

A. It depends on how he plucks them.

Q. No. When he did pluck them. You heard him pluck them?

A. That has been some time ago since I heard him pluck them, so I would have to ask him to pluck them again to see whether or not they were of the same value.

Q. Now, in plucking on a violin, can you pluck the entire range of time length from a whole note down to a 32nd of a note?

A. Have I?

Q. Can you? A. It can be done, yes, sir.

Q. Do you think that counsel had that skill and was able to do so and did so?

A. I doubt very much if he would be able to play a composition in march tempo and have a 128th note in there some place.

Q. Now, one other thing I would like to ask you about [138] music, and that is that on Exhibit D there appear the figures 4/4, 2/4, C, 3/8, 3/4; what do those figures stand for?

A. They indicate the number of beats to the bar.

(Testimony of George G. Schneider.)

Q. Now, there is also one that is not on here, which I have seen on one of your other charts, which is a C with a line through it. What does that refer to?      A. That also is a time signature.

Q. How many different time signature are there in common usage in the musical art?

A. Any number of them, sir, unlimited.

Q. An unlimited number?      A. Yes, sir.

Q. And in the charts that you have made, you have used the C with a line through it, which is one, the 4/4 which is two, the 2/4 which is three, the C which is four, the 3/4 which is five, and the 3/8 which is six, is that right, six different time signatures?      A. On these charts, yes, sir.

The Court: We might take the morning recess at this time, counsel. We will take the morning recess.

(Recess.)

Mr. Hoppe: Now, Mr. Schneider, the do-mi-fa——

Mr. Rudin: “Do-mi-sol.”

Q. (By Mr. Hoppe): The do-mi-sol triad appears in [139] “The Blacksmith Blues” with the E-flat, dotted eighth and the E-flat sixteenth variation, does it not?      A. Yes, sir.

Q. And it appears several times in “The Blacksmith Blues”?      A. Yes, sir.

Q. Does it appear in “Happy Pay Off Day”?

A. Yes, sir.

Q. And it appears in there several times?

(Testimony of George G. Schneider.)

A. At least twice.

Q. Now, with this same variation which you and I have just discussed, that is, the E-flat, dotted eighth and the E-flat sixteenth? A. Yes, sir.

Q. I am turning now to Exhibit 3, Defendants' Exhibit 3, which is your large chart, what source material did you use for the first line of that "Happy Pay Off Day"?

The Witness: Excuse me. Aren't you referring to C?

Q. (By Mr. Hoppe, continuing): Yes, Exhibit C.

The Witness: Exhibit C?

Mr. Hoppe: Yes.

The Witness: I thought you said 3, Excuse me.

Q. (By Mr. Hoppe, continuing): Exhibit C; what source material did you use for that?

A. A copy of the song.

Mr. Rudin: I object to that line of cross-examination. [140] If counsel is making any contention that Exhibit C improperly reports the music which is already in evidence, let him say so without spending a lot of time going into source material. It is completely unimportant what he copied it from. The question is, is it this music that is involved in this lawsuit? If he says it isn't, let us find out.

Mr. Hoppe: I want to find out myself, sir.

Q. May I see the original from which you copied that?

A. You have a copy of it here in your exhibits. I'll get my original.

(Testimony of George G. Schneider.)

Mr. Rudin: Your Honor, I again object. It is completely unimportant where he copied it from. If it is the music that is involved here, O.K. If it isn't, I don't think counsel is entitled to it. We are only concerned with the music involved in this case.

The Court: We are only concerned with the music involved here.

Mr. Hoppe: Well, it didn't sound like that to me on the record, your Honor, and I want to find out.

The Court: Well, let us let him answer the question, Mr. Rudin.

Mr. Hoppe: We will make much more time, your Honor.

The Witness: Your Honor——

The Court: The witness wants to clear it up. What do [141] you want to say?

The Witness: Yesterday, I was asked to identify all four of these sources from which I made this chart and I did identify all four of them from the exhibits that are already here.

Q. (By Mr. Hoppe): Yes, but you didn't have that record, Exhibit 9, when you made the chart, did you, sir?

A. I didn't have any record as such. I have never used a record.

Q. You used a piece of sheet music?

A. I did, sir.

Q. May I see that piece of sheet music?

A. Excuse me, sir.

(Testimony of George G. Schneider.)

(The witness left the witness stand temporarily and produced a piece of sheet music.)

Mr. Hoppe: Will you mark this, please?

The Clerk: 16.

(Said document was marked as Plaintiff's Exhibit 16, for identification.)

Q. (By Mr. Hoppe): You have just handed me a piece of sheet music entitled "Happy Pay Off Day"? A. I did, sir.

Q. And that was the source material for the first line on the chart, Defendants' Exhibit C?

A. Yes, sir. [142]

Mr. Hoppe: We offer the exhibit in evidence as Plaintiff's Exhibit 16, your Honor.

The Court: All right.

The Clerk: Plaintiff's Exhibit 16 in.

(Said document was received in evidence as Plaintiff's Exhibit 16.)

Q. (By Mr. Hoppe): Now, turning to Exhibit C, if we use the do-re-mi-fa-sol type of music terminology for "Good Old Army," the opening theme would be do-do, mi-mi, fa-sol, would it not?

A. Correct.

Q. And the opening theme for "The Blacksmith Blues" would be do-do, mi-mi, fa-sol, would it not?

A. No, sir.

Q. And for "Happy Pay"—

A. No, sir.



(Testimony of George G. Schneider.)

Q. What would it be?

A. There is a difference on your fifth note. It will be do-do, mi-mi, fe, instead of fa.

Q. Fe? A. Fe, yes, sir.

Q. Fe-sol? A. Yes, sir.

Q. And the opening theme for "Happy Pay Off Day" would be do-mi-do-fe-sol, is that right? [143]

A. Correct.

Q. And the 11th bar of "Happy Pay Off Day" would be do-do-re-do-fe—— A. No, sir.

Q. Do-do, re, do—— A. No, sir.

Q. What would it be?

A. You said the 11th bar.

Q. The 11th bar of "Happy Pay Off Day"?

A. It would be do-do-mi-do-fe-sol-sol-do, going into the 12th bar.

Q. Now, do you know of any do-mi-sol triads which are written in 4/4 time which are part of the prior art?

Mr. Rudin: I object to that question, your Honor, on the ground that it leaves an implication that it has to be written in 4/4 time. Otherwise it has no relationship to this and the witness has testified that 4/4, 6/8 is a construction of relationship. On that basis the question is misleading and I object to the form of it, your Honor.

The Court: I will overrule the objection. You may answer.

The Witness: Will you state the question again, please, sir?

(Testimony of George G. Schneider.)

Mr. Hoppe: Will you read the question to the witness, [144] Mr. Reporter?

(Pending question read by the reporter.)

The Witness: Part of the what, sir?

Q. (By Mr. Hoppe): A part of the prior musical art? A. "Old Black Joe."

Q. "Old Black Joe" is in the C; is that 4/4 time? A. Yes, sir; common time.

Q. If you pardon me, again I am trying to find out what this is about, Mr. Witness, but I thought the C with the line through it was 4/4 time?

A. C with the line through it is what we call cut time. As a rule, it corresponds to two beats to the measure rather than four beats to the measure.

Q. And is that cut time the thing the dot at the end of the first musical note gives you, is that part of the cut time? A. No, sir.

Mr. Hoppe: That is all.

### Redirect Examination

By Mr. Ruiz:

Q. Mr. Schneider, Defendants' Exhibit D, I understand, represents the triad sequence, do-mi-sol, "Good Old Army" and other source musical compositions, is that right?

A. Yes, sir; these other compositions are based upon that triad. [145]

Q. Now, counsel on cross-examination has differentiated note values as to each tone of the triad contained on said Exhibit D, has he not?

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. Does the time value of notes in any fashion change their tonal sequence?      A. No, sir.

Q. Exhibit D, does it not, depicts tonal sequence only?      A. Yes, sir.

Q. Now, to point out tempo dissimilarities, without affecting tonal sequence, certain questions have been asked of and concerning Exhibit D, which is a comparative chart between "Good Old Army" and other source material which you played on the piano, is that not true?      A. Correct.

Q. Were we likewise to point time value differences in your comparative chart on Exhibit C where you have delineated the similarity of four notes between "Blacksmith Blues" and "Good Old Army" and "Waitin' for My Baby," is it not a fact that there would be even less similarity than your chart indicates?

A. If we were taking time values?

Q. Yes; there would be less similarity than that chart indicates?

A. There would be, yes. [146]

Q. And there would be substantially less similarity, would there not?      A. Yes, sir.

Mr. Ruiz: You may cross-examine.

Mr. Hoppe: May I approach the witness, your Honor?

The Court: Yes.

(Testimony of George G. Schneider.)

Recross-Examination

By Mr. Hoppe:

Q. On Exhibit 3, if we give the notes their time value, the similarity on the first note would still exist, would it not? A. Correct.

Q. The similarity on the second note would still exist, would it not? A. Yes, sir.

Q. That similarity we have been unable to find in the prior art; is that not so?

A. The syncopation——

Q. The syncopation and the note values?

A. I haven't gone into it to that extent, sir.

Q. But you haven't seen it?

A. I didn't go into it for that.

Q. So you don't know?

A. I cannot answer that.

The Court: A little louder, Mr. Schneider.

The Witness: I cannot answer that. [147]

Q. (By Mr. Hoppe): And you know of no prior art music that has that relationship of tone values and timing such as illustrated in those two notes?

A. At the present time, I do not.

Q. Now, with reference to the third note, there still would be the similarity if we talked about tone values in all of their aspects? A. Yes, sir.

Q. And with respect to the fourth note——

A. Yes, sir.

Q. ——we would have the same?

A. Yes, sir.

(Testimony of George G. Schneider.)

Q. The fifth note, you would still urge that there is a dissimilarity, would you not?

A. Yes, sir, a definite dissimilarity in tone value.

Q. But not in time value?

A. Not in time value.

Q. And on the sixth note, you would still have the same similarity, would you not?

A. Yes, sir. Do you want to finish the book?

Mr. Hoppe: No. I just want to go that far.

The Witness: Excuse me.

Mr. Hoppe: That is all.

### Redirect Examination

By Mr. Ruiz:

Q. Now, counsel said he just wanted to go [148] that far. Now, I will give you the entire composition. You will notice that I have placed some checks every place where you heretofore set forth in your comparative chart as having been similar. Have you noticed that? A. Yes, sir.

Q. And I will make the number of checks, 1, 2, 3, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, '1, '2, '3, '4, '5, '6, '7, '8, '28; have you noticed 28 checks? A. Yes, sir.

Q. Now, will you examine every one of those checks and tell me whether the tonal tempos, the values of the tempo are different?

A. On number one—I beg your pardon—your first check mark, there is a difference.

Q. Rather than go all through it, for purposes



(Testimony of George G. Schneider.)

of time, just examine them and tell me whether those checks indicate different tempos or different values as to time?

A. With one exception, sir.

Q. Instead of 28 there's 27? A. Yes, sir.

Mr. Ruiz: Very well.

The Witness: These two (indicating) has the same time value.

Mr. Ruiz: All right. You can make a circle around that. [149]

(The witness draws a circle around figures.)

Q. Now, then, as far as bringing it down to fine tempo, in the 32 bars the only tempo similarity, by way of comparison, is contained in four notes only, is that not true? A. And their repetitions.

Q. Well, how many times are those repeated?

A. In bar 1 they are the same; in bar 1 only.

Q. In bar 1 only, then? A. Yes.

Q. In other words, not even in repetitions?

A. Yes, sir.

Q. Only in bar 1, only, are tempo values similar in any of the compositions that you have made reference to? A. Tempo and tonal.

Q. I am talking about tempo and tonal, yes?

A. Yes, sir.

Mr. Ruiz: That is all.

(Testimony of George G. Schneider.)

Recross-Examination

By Mr. Hoppe:

Q. Now, Mr. Schneider, with reference to this tempo in bar 1 which I have marked with a circle——

A. Yes, sir.

Mr. Hoppe: Do you have the original exhibit? Let us get the original Exhibit C.

The Witness: What is that? What is it you are looking for? [150]

Mr. Ruiz: Your comparative analysis, the original.

Mr. Hoppe: Here it is.

The Witness: Oh, I beg your pardon. Excuse me.

Q. (By Mr. Hoppe): Now, I ask you to mark with a circle in "Blacksmith Blues" the first bar that you say the tempo is repeated only once? Would you mark that in a circle?

A. That was not the question. It was the tempo and the tonal.

Q. All right, the tempo and the tonal——

A. Yes, sir.

Q. ——would you mark that with a circle?

A. Yes, sir.

(The witness places a circle on exhibit.)

Q. And I will put an X on that circle.

(Mr. Hoppe writes an X on said exhibit.)

Now, I will segregate from that circle the top part of it which we will mark Y (Mr. Hoppe writes

(Testimony of George G. Schneider.)

a Y on said exhibit), which is the part that appears in "The Blacksmith Blues." Now, that circle marked Y with the same tempo and the same tonal arrangement appears many times in different bars of "The Blacksmith Blues," is that correct?

A. It is, sir.

Q. And how many times does it appear in the 32 bars that you have mentioned there?

A. That is the only place, sir, that that exact phrase appears in "Blacksmith Blues," in that tempo and tonal value. [151]

Q. Now, you pointed to several places here. You pointed in bar 3, which I will mark Z.

(Mr. Hoppe writes a Z on Exhibit C.)

Are there any similarities between the bar marked Z and the Plaintiff's bar within the circle marked X, in tonal value and timing?

A. There is a difference, sir.

Q. I said are there any similarities?

A. There are.

Q. And that is that in bar 3, the first note, both in tonal quality and value is identical with the first note in "Good Old Army"? A. Correct.

Q. The second note is identical in value and in quantity with the second note of "Good Old Army"? A. Correct.

Q. The third note in your song, which is "Blacksmith Blues," has the same tone but it has two flags on it, whereas in "Good Old Army" it has one flag and the dot? A. Correct.

(Testimony of George G. Schneider.)

Q. In the next note, the note differs, that is the fourth note—has the same value and the same tone?

A. No. It does not, sir.

Q. The fourth note?

A. We are past the third note. [152]

Q. No. We are up to the third.

A. Correct, sir.

Q. The fourth is identical? A. Correct.

Q. The fifth has the same change in it that the fifth note had in the phrase marked with the Y?

A. Correct.

Q. The sixth note has the same tone but a different value? A. Correct.

Mr. Ruiz: Now, you have been pointing to “The Blacksmith Blues” down here (indicating), counsel, and “The Blacksmith Blues” up there (indicating) while you have been interrogating the witness and he has been comparing “The Blacksmith Blues” with “The Blacksmith Blues.”

Mr. Hoppe: All right.

Q. All right, we will go back and we will compare—I think the witness and I were talking together here, but we will do it over again—we will compare bar 1 of “Good Old Army” and bar 3 of “The Blacksmith Blues.”

The Witness: O.K.

Q. (By Mr. Hoppe, continuing): And we will go through it again. The first note is identical both in tone and quantity? A. Right.

Q. The second note— [153] A. Right.

Q. —is identical both in tone and quantity?

(Testimony of George G. Schneider.)

A. Right.

Q. The third note is identical in tone but not quantity? A. The third note is the same, sir.

Q. The third note is the same?

A. Yes, sir. These two notes (indicating) are the same.

Q. They are the same?

A. Yes; on the second line with one flag with a dot after it.

Mr. Rudin: Your Honor, this all may be interesting, but it seems to me that the exhibit is in evidence, and as to the number of notes which are the same the exhibit is the best evidence of that fact.

Mr. Hoppe: He had already testified as to what the exhibit shows and his testimony isn't quite accurate, counsel.

Mr. Rudin: I haven't finished my objection. And I think there ought to be some limit on this type of cross-examination, or we are going to be here for days or weeks.

The Court: Well, I think he is about finished, Mr. Rudin. You are about finished, aren't you?

Mr. Hoppe: As soon as I go through with this, I am all through, Mr. Rudin.

The Court: All right. I will overrule the objection. [154]

Mr. Rudin: O.K., only I think the exhibits speak for themselves.

Mr. Hoppe: Now I have gotten confused here with the interruption, so let us start over again.



(Testimony of George G. Schneider.)

The Witness: We are now comparing "Good Old Army" and "The Blacksmith Blues."

Mr. Hoppe: We are now comparing "Good Old Army" and "The Blacksmith Blues"?

A. Correct.

Q. And we are comparing——

A. Bar 1.

Q. ——Bar 1 of "The Blacksmith Blues" with bar 3—no—bar 1 of "Good Old Army" with bar 3 of "Blacksmith Blues."

In each case the first note of the bar is identical both in tonal quality and in quantity?

A. Correct.

Q. The second note is identical?

A. Correct.

Q. What about the third note?

A. Correct.

Q. What about the fourth note?

A. The same.

Q. The fifth note differs in the same respect that the fifth note of bar 1 of the two pieces of music varies? A. Correct. [155]

Q. The sixth note is the same in quality but not in quantity? A. Correct.

Mr. Ruiz: Let us finish the bar, counsel.

Q. (By Mr. Hoppe): Then the 7th note is different from the seventh note of "The Blacksmith Blues" both in quantity and in quality?

A. Sir, we cannot compare them that way, because we have a shorter value on this note (indicating) than we have up here (indicating). In other

(Testimony of George G. Schneider.)

words, this note (indicating) is in both of these two (indicating).

Q. So we can't really compare after the first, second, third, fourth, fifth notes, we can't make any further comparison?

A. Excepting for the changes.

Q. Excepting for the changes?

A. Yes, sir.

Q. Now, the theme of bar 1 of "The Blacksmith Blues" or the theme of bar 3 of "Blacksmith Blues," one or the other——

A. They are different, sir.

Q. (Continuing): I am trying to put them together.

The Witness: Oh, I beg your pardon, sir.

Q. (By Mr. Hoppe): Whatever commonness they have between them the commonness between bar 1 of "Blacksmith Blues"—— [156]

Mr. Ruiz: I object to the question as being speculative. Whatever difference or whatever commonness they have together is not a proper question.

The Court: Yes; I will sustain the objection.

Mr. Hoppe: All right. Thank you, your Honor.

Q. Now we will go on to bar 5——

A. Yes, sir.

Q. ——of "Blacksmith Blues" and there we again have the do-mi-do-mi-sol triad, do we not?

A. No, sir; we do not.

Q. That is not the same?

A. No, sir. They are in different key now.

(Testimony of George G. Schneider.)

Q. But I understood that we have the same music if we change the key?

A. You have the same tonal relation if you change the key.

Q. All right, we have the same tonal relation between notes in 5 that we do in 1, except the key has been changed; is that right?

A. No, sir; we do not. We do not. In number 1, with your permission, sir, between our first and second tones we have an interval of a third. In bar 5 we have less than a third, we have it from a B-flat to a D.

Q. Well, let us get away from some of these musical terms and discuss it this way——

Mr. Ruiz: If the court please, this is a [157] musical copyright infringement action——

Mr. Hoppe: That is right.

Mr. Ruiz: And for purposes of the record we have to use musical terms.

Mr. Hoppe: We will——

The Court: All right, that was just a statement.

Mr. Ruiz: That was just a statement, your Honor.

Q. (By Mr. Hoppe): Now, in bar 5, the first note of bar 5 of "Blacksmith Blues"——

A. Yes, sir.

Q. ——is a dotted eighth? A. Yes, sir.

Q. The second note of bar 5 is a dotted sixteenth? A. Is a sixteenth.

Q. Is a sixteenth? A. Correct.

Q. The first note of bar 1 of "Good Old Army"

(Testimony of George G. Schneider.)

is a dotted eighth?      A. Correct.

Q. The second note is a sixteenth?

A. Correct.

Q. Now, in both bar 5 of "Blacksmith Blues" and bar 1 of "Good Old Army" the third note is up two tones higher than the second note, is that right?

A. No, sir. It is not. [158]

Q. What is it up higher?

The Witness: What happened to the piano? I would have to go to the piano to show you.

Mr. Ruiz: He said he would have to go to the piano to show him, because he is giving tempo values and they are different notes and not even the same notes, your Honor.

The Court: All right.

Mr. Ruiz: They are different notes on the scale.

Mr. Rudin: Well, if your Honor please——

The Court: Mr. Hoppe said he is about finished.

Mr. Hoppe: I am just about through, Mr. Rudin.

The Court: Go ahead.

Q. (By Mr. Hoppe: If we transpose the notes in bar 5 of "The Blacksmith Blues" so that note 1 of bar 5 is located at the same place on a staff—now this is a hypothetical question—at the same place on the staff—is this the staff (indicating)?——

A. Yes, sir.

Q. ——on the staff as the first note of bar 1 of "Good Old Army" is located—do you understand my hypothetical question?      A. Yes, sir.

Q. ——(Continuing) and if we transpose all of the other notes the same number of spaces on the staff—do you understand my question so far? [159]

(Testimony of George G. Schneider.)

A. Yes, sir.

Q. (Continuing): We would then have the relationship where note 1 of bar 5 as so transposed would be located where note 1 of bar 1 of "Good Old Army" is?

Mr. Ruiz: I would like to interpose an objection at this time. Now, the question has been this: If in the middle of that piece you change the key, he wants to know if the notes would then be similar, and since the musical composition is written in one key only, the answer gets us no place, your Honor. The notes are different, but counsel is now trying to make them the same notes by asking the witness to transpose a particular bar into a different key.

Mr. Wolff: May I add to that, your Honor, that as counsel himself has stated, it is purely a hypothetical problem of transposing notes. He wants then, as I understand the question, to compare bar 5 in "Blacksmith Blues" as thus transposed, purely hypothetically transposed, to bar 1 of "Good Old Army," the plaintiff's composition. We are comparing not only different bars in different selections, but we are taking the second selection and putting them in different places other than they are actually written.

Mr. Ruiz: That is right.

Mr. Hoppe: I would like to be heard on it. [160]

Mr. Ruiz: That is why he wants to go to the piano, so the Judge can hear it, because they are different notes.



(Testimony of George G. Schneider.)

Mr. Hoppe: Your Honor, I would like to be heard on that.

The Court: Do you want to go to the piano?

The Witness: Yes, sir.

The Court: All right, let him go over to the piano, then. You may go right over to the piano.

The Witness: Yes, sir, but before I go, may I make this statement?

The Court: Yes.

The Witness: It would be just the same thing as my saying something at the same time in English and in Latin.

We are trying to transpose one bar of a middle of a song but keep the first bar the same, and we will not get any place.

The Court: Well, Mr. Hoppe has asked you the question. You may go around to the piano and the reporter will sit over there, too.

Q. (By Mr. Hoppe): I am going to ask you to play bar 1 of "The Blacksmith Blues" and I am going to ask you to play bar 1 of "Good Old Army"; I am going to ask you to play bar 5 of "Blacksmith Blues" and then I am going to ask you to play bar 1 of "Good Old Army"?

A. Bar 1 of "Good Old Army"? [161]

Q. Bar 1 of "Good Old Army."

A. (The witness plays on piano.)

Q. Now, please play bar 1 of "Blacksmith Blues."

A. Correct. (The witness plays on piano.)

(Testimony of George G. Schneider.)

Q. Now I want you to play bar 5 of "Blacksmith Blues."

A. Bar 5 of "Blacksmith Blues." (The witness plays on piano.)

Q. Now I want you to play bar 1 of "Good Old Army." A. (The witness plays on piano.)

Q. Now, the difference between bar 5 of "Blacksmith Blues," watching your hands, and the difference in bar 1 of "Blacksmith Blues" is that in peeling off, all the notes are done roughly a third of an octave, is that right? A. A fourth.

Q. A fourth of an octave? A. Yes, sir.

Q. That was the difference between one and the other?

Mr. Ruiz: Different notes, fourth of an octave different, is that right?

A. Yes, sir.

Q. (By Mr. Hoppe): Now, when you played Exhibit D there, you had transposed all of the notes to the same octave, did you not?

A. To the same key. [162]

Q. To the same key? A. Yes, sir.

Q. And if you had played the prior art music, you would have seen some difference and many differences?

Mr. Wolf: I object.

Q. (By Mr. Hoppe, continuing): Sometimes with respect to an octave, sometimes a part of an octave and sometimes by a note difference, is that not correct? A. Correct.

Mr. Hoppe: That is all.

Mr. Wolff: If your Honor please, counsel was comparing two utterly and totally different things. He was comparing a transposition for the purpose of presenting the material which Mr. Schneider presented to the court, all in the same key.

Mr. Rudin: The music would be capable of easier comparison as to differences and similarities.

The Court: I understand that. Is there any further redirect from Mr. Schneider?

Mr. Ruiz: No.

Mr. Rudin: None on our behalf, your Honor. We have another expert witness that we would like to get through with today.

The Court: Go right ahead. Ask leading questions, if you want to. [163]

### DAVID RAKSIN

called as a witness herein on behalf of defendants, being first duly sworn, testified as follows:

The Clerk: State your name for the record, please.

A. My name is David Raksin. R-a-k-s-i-n.

The Court: Go right ahead.

### Direct Examination

By Mr. Wolff:

Q. Mr. Raksin, will you describe your educational background?

A. I had private education in music from the time I was about three years old, with various teachers, some of whom are—well, the most impor-

(Testimony of David Raksin.)

tant one is Arnold Schoenberg, who is one of the two or three greatest musicians of our day.

I studied at the University of Pennsylvania, from which I hold a degree.

I have continued my studies all through my professional career.

Q. The Degree that you have from the University of Pennsylvania, is that in the field of music?

A. Bachelor of Music.

Q. The studies that you had with Dr. Schoenberg, for example, were in what aspects of the field of music?

A. Composition, form, theory.

Q. Have you been a composer of music? [164]

A. I am a composer, I am a conductor, orchestrator, an arranger, and I have been at various times a researcher and a lecturer.

Q. Do you play any musical instruments?

A. I play at various instruments. It has been some years since I made my living as an instrumentalist, and I play the piano to some extent.

Q. Can you list for us, please, some of the musical compositions that you have composed?

A. Well, the best known films composed by me are—the scores composed by me are “Laura,” “Smokey,” “The Bad and the Beautiful,” “Forever Amber,” and “The Secret Life of Walter Mitty.” I have done I guess around a hundred films. There are all kinds of films I have—well, the manuscripts of nine of the scores of those films are in the Library of Congress, at the request of the Music Branch of the Library of Congress.

(Testimony of David Raksin.)

Q. That is somewhat of a distinction?

A. Well, no other composer can make this claim, no composer of film music I mean.

Q. Through your work in the motion pictures or motion picture film scores, would this be considered to be in the field of popular music?

A. No. It is in the field of all kinds of music.

Q. Have you any particularity with the field of popular [165] music?

A. Yes. I have written a great deal of popular music, show music. I have one song which is the second most recorded song in the history of popular music. That's "Laura."

Q. Mr. Raksin, I think the quickest way for us to get on would be to ask you, if I may, to seat yourself at the piano, sir.

(Witness complies with counsel's request.)

Mr. Wolff: May I ask Mr. Raksin to play?

Q. Do you have the sheet music of "The Blacksmith Blues" before you?      A. I have it.

Mr. Wolff: Perhaps it would be preferred that he play right from the exhibits. May I also have Plaintiff's Exhibit 3, the sheet music, and 2.

Q. I am handing to you Plaintiff's Exhibit 8, which is "The Blacksmith Blues" edition, "Words and Music by Jack Holmes"; secondly the Plaintiff's Exhibit 2, which is the song entitled "Good Old Army," as well as Plaintiff's Exhibit 3, which is also "Good Old Army," written in the key of E-flat. I will ask you to place those three before



(Testimony of David Raksin.)

you and would you kindly play, first the first measure of "Good Old Army" as it appears in either one of the two "Good Old Army" versions that are before you? [166]

A. (The witness plays piano.)

Q. Now would you play the first measure of "The Blacksmith Blues"?

A. (The witness plays piano.)

Q. Mr. Raksin, you have heard I am sure in the last few moments this first measure, a theme or motif characterized as a triad, have you not?

The Court: Just answer.

A. Yes, sir.

Q. (By Mr. Wolff): A triad consists of how many notes, sir?

A. A triad consists of 3 notes.

Q. Are there three or are there more than three—

A. There are four.

Q. Let me finish my question. Are there three or more than three separate notes in the first measure of "Good Old Army" that you played?

A. There are four.

Q. And the same question as to the first measure in "The Blacksmith Blues" that you played?

A. There are four.

Q. So, strictly speaking, then, is this a triad?

A. Well, it is not strictly a triad.

Q. Could you characterize it in another way?

A. It is actually a melody, a sequence of notes, and [167] upon this triad in E-flat it contains in

(Testimony of David Raksin.)

each case a short note which you could call a passing note.

Q. So that the musical note for this fourth note is the passing note?

A. Yes, sir, the passing note.

Q. Are the passing notes upon the first measure of "Good Old Army" and in the first measure of "The Blacksmith Blues" the same?

A. They are not.

Q. What is the passing note in the first measure of "Good Old Army"? A. It is A-flat.

Q. What is it in "Blacksmith Blues"?

A. It is a-natural.

Q. Are A-flat and a-natural the same note?

A. They are not.

Q. Are there many forms in which the note A could be written?

A. Within our scale there are five.

Q. And do each of these sound the same?

A. They do not. May I play them?

Q. Would you kindly illustrate these five forms and explain to us what they are?

A. This is a-natural (witness plays on piano). This is A-flat (the witness plays on piano). [168]

This is A double flat, which is the same as G, but it is A double flat (playing piano).

Now going back up the scale, I will play A again. (Witness plays on piano.)

This is A sharp (playing on piano) and this is A double sharp (playing on piano).

So, there are altogether five notes. If you would

(Testimony of David Raksin.)

play them together, you would see the difference, it would be like this (playing on piano); and if you played A and A-flat together, they would be different, too.

They are two different notes and in this case particularly significant.

Q. In what way are they significant?

A. Well, in the matter of the intent of the first bar where you have a note that goes (playing on piano), and you have another one that goes (playing on piano).

Now, there are two significant things about the difference. One is that if it is played together, you would have (playing on piano).

And "The Blacksmith Blues" has also a difference of rhythmic intent. First, I want to make clear that these two notes are much different (witness plays on piano), which is "Good Old Army" and again, in "Blacksmith Blues" (witness plays on piano). Now, the other thing in "Blacksmith Blues"—shall I go on? [169]

Q. Please do.

The Witness: —the fact that there is a syncopation on it and which is carried out to the end of the bar, and the intent is usually to lap the rhythmic impulse over into the next bar, so you get (witness plays on piano). You see, that thing is the significant thing to a musician, that, and the difference in the a-natural and in A-flat.

Q. (By Mr. Wolff): You are now referring, if I understand you correctly, to the last note in "The

(Testimony of David Raksin.)

Blacksmith Blues,” and for the same portion of the measure of “Good Old Army”; there is a note in “The Blacksmith Blues,” whereas, there was a rest in “Good Old Army”?

A. That is right. This note does not exist in the “Good Old Army.”

Q. That note doesn’t exist?

A. It does not appear at all.

Q. And that note is a carry-in to the next measure?

A. Yes, it is a rhythmic carry-in, into the next one.

Q. Mr. Raksin, would you now play measure number 2 of “Good Old Army”?

A. (The witness plays on piano.)

Q. Would you now play measure 2 of “The Blacksmith Blues”?

A. (The witness plays on piano.) [170]

Q. Are you able, sir, to play those two together?

A. I doubt it, but I will try (the witness plays piano). That’s it, and that is when they go together.

Q. And in those measures, measure No. 2, respectively, of these two compositions, are there significant differences or similarity?

A. There are, yes, there are significant differences, both, in rhythm, for instance, the first beat in “Good Old Army” is in that bar (playing on piano), and the other one is up here, an octave higher, like that (playing on piano) and it goes down, it goes (witness plays on piano), whereas, in

(Testimony of David Raksin.)

“Good Old Army” it goes up (witness plays on piano).

Then, of course, there is also the fact that in “The Blacksmith Blues” you have this a-natural.

I will play “Good Old Army” with my left hand and “Blacksmith Blues” in that bar with my right hand (the witness plays piano). You see, the bars are different, the rhythm is different; the descending line in “The Blacksmith Blues,” the ascending line in “Good Old Army” and the a-natural versus the A-flat are different.

Q. I will ask you to play bar 3, if you would, please of “Good Old Army”?

A. (The witness plays on piano.)

Q. Would you play bar 3 of the “The Blacksmith Blues”? [171]

A. (The witness plays on piano.)

Q. Do I dare ask you to play the two of those together?

A. Maybe you do, but I don’t know whether I can do it. Let me see. (The witness plays on piano.)

Q. There are significant differences in bars 3?

A. I think they are so audible that it doesn’t take a musician to hear them.

Q. Going on now, then, with bar 4, play bar 4, first, if you please, of “Good Old Army”?

A. (The witness plays on piano.)

Q. And would you play bar 4 of “The Blacksmith Blues”?

A. (The witness plays on piano.)

Q. And together?



(Testimony of David Raksin.)

A. Together? (Witness plays on piano.) Wait a minute. We are on bar 4 now, are we?

Q. Yes.

A. Let me see (witness hums). Well, in "Blacksmith Blues." I guess I would have to play up on the top (witness plays on piano).

Q. Any comments, Mr. Raksin, that you can make as to a comparison of the respective bars 4?

A. Well, they are not the same, very clearly not the same.

Q. Can we go on, then, please? Would this assist you—— [172]

Mr. Rudin: Do you have any objection if Mr. Schneider plays one of the lines?

The Witness: Maybe one of the other gentlemen can play one of the lines, because it is hard to play the two of them.

The Court: All right.

Q. (By Mr. Wolff): We are now on bar 5, if you please. A. Bar 5.

Q. Would you play bar 5 of "Good Old Army"?

A. Bar 5 of "Good Old Army" (the witness plays piano). That is bar 5 of "Good Old Army."

Q. Would you play that again?

A. All right. (The witness plays on piano.)

Q. Can you proceed and also play bar 5 of "The Blacksmith Blues"?

A. (The witness plays on piano.)

Q. Now, can we have our duet, Mr. Raksin, playing?

(Testimony of David Raksin.)

(Piano played by Mr. Raksin and Mr. Hoefle.)

Q. Can you make any comments as to the similarity or dissimilarity of those bars?

A. Well, just as an indication, the bar 5 of "The Blacksmith Blues" has six notes and bar 5 of "Good Old Army" has 3 different notes. One note is tied over to another. That means it is the same note.

Q. And melodically? [173]

A. Melodically, of course it is very easy to see that there is no similarity between this which is "The Blacksmith Blues" (the witness plays on piano) and the "Good Old Army" again, which is (the witness plays on piano).

Q. Thank you. Please play bar 6, if you will, now? A. Of the "Good Old Army"?

Q. Yes, of the "Good Old Army."

A. (Witness plays on piano.) That is "Good Old Army."

Q. And bar 6 of "The Blacksmith Blues"?

A. (The witness plays on piano.)

Q. Can you play those two together?

A. Play them together. Let me see if I can find this bar; 1, 2—(the witness plays on piano).

Q. Are there any comments, if you would, please, on the similarities or dissimilarities of bar 6, Mr. Raksin?

A. There are no similarities that any reasonable musician could perceive.

(Testimony of David Raksin.)

Q. Are you speaking both from the standpoint of the notes as well as the rhythm?

A. The notes, the rhythm, and if I am permitted to say so, what you hear, the intent.

Q. Would you now play bar 7, if you would, please, of "Good Old Army"? [174]

A. I just want to make sure I get the right bar. There is 3, 4 (witness plays on piano); one note.

Q. And bar 7 of "The Blacksmith Blues"?

A. (The witness plays on piano.)

Q. Can you play them together?

A. 1, 2, 3, 4 (the witness plays piano).

Q. Bar 7 of the "Good Old Army" is a whole note, is it not?

A. Yes, it contains one note.

Q. Which is properly given how many counts in measurement? A. In this count, four.

Q. And how many notes are there in bar 7 of "The Blacksmith Blues"? A. There are 7.

Q. And tonally, do the notes blend well together?

A. They do not, because this is G-flat in the "Good Old Army" which is the minor third of the scale and the significant note in determining that scale or deciding whether it is a major or a minor, and here you do have a G which is also at the end.

Q. Where is "here," Mr. Raksin?

A. I beg your pardon. In "The Blacksmith Blues," it does have a G, which is a G-natural, though, at the end of the bar, and it is the sixth note of the seven, whereas, the G-flat is the only

(Testimony of David Raksin.)

other note in the bar and consequently you can't call it significant. [175]

Q. Will you now make the same comparison with number 8? First, would you play the "Good Old Army"?

A. (The witness plays on piano.) That's it.

Q. I am lost in your "That's it."

A. Yes, the wording is "Yes, I love it" and the note is just that (witness plays on piano).

Q. And then there are rests? A. Rests.

Q. For the balance of the measure, is that right?

A. Precisely.

Q. And then would you play bar 8?

A. (The witness plays on piano.) Now, the comment there is very simply that they are both of them phrases, or 8-bar phrases; in this case, we have an F-natural (witness plays on piano), one note with three beats, rest, and in the note itself you have a very significant thing, which is a triplet (witness plays on piano), and you also have this F sharp which of course is a passing tone in the key and it does not appear at all in "Good Old Army." It is just in this bar (witness plays on piano), and that is "The Blacksmith Blues," and the "Good Old Army" in the same bar is (the witness plays on piano).

Q. I take it, then, from the shortness of the note in bar 8 of "Good Old Army" and from the fact that there are numerous notes in "Blacksmith Blues," that there are [176] rhythmic differences as well as tonal differences?

(Testimony of David Raksin.)

A. There are. In the 8 bars there are rhythmic differences. The triplet does not appear anywhere in the "Good Old Army." It is a different kind of rhythmic stunt, a different intent.

Q. One more question concerning bar 8. You stated, if I understood it, that both bar 8's are the customary tones of a phrase or something to that effect?

A. They are the concluding bar of an 8-bar phrase. This song is written—both songs are written in forms where the 8-bar phrases are significant.

Q. Are the 8-bar phrases common or now in popular music?

A. They are so common that it is unusual to find one which is not 8 bars long.

Q. Then it is the rule, I take it?

A. It is the rule.

Q. The fact that both songs have 8-bar phrases, would you characterize that as a significant similarity?

A. Not possibly.

Q. Then going on with the songs, the two songs, then, go back and repeat essentially the first portions of their melodic lines, is that correct?

A. Yes. The "Good Old Army," if I make it out to be correct, repeats exactly, and so exactly that it is substantially within a note or two exactly the same thing. [177] You can look at them. They are the same thing. Here is the a-natural in one bar and in, 1, 2, 3, 4, in the 9, 10, 11, 12th bar of "Good Old Army" there is an A-natural in the descending tone which—may I play it?



(Testimony of David Raksin.)

Q. Play bar 12, then, first in "Good Old Army."

A. (The witness plays piano.) "Good Old Army" (playing piano).

Q. Could you play bar 12 of "The Blacksmith Blues"? A. (The witness plays on piano.)

Q. Can you play those two bars together?

A. (The witness plays on piano.)

Q. Are there any other changes in "Good Old Army" from the first eight bars to the second, as compared to the second bar?

A. I do not see them, no. No. They are not there.

Q. Are there any changes in the second eight bars of "Blacksmith Blues"?

A. There is one, the fact that this bar 5, when it comes back again, instead of going like this (playing on piano), and with intent to go into the next bar, and with this one it is a whole note, and bar 1 to 12, 10, 11, 12, 13, 14, it is a whole note, meaning four beats. There is this difference there, if you wish to compare it with the same bar, bar 14.

Q. Yes, I would, please. [178]

A. (Witness plays on piano.)

Mr. Hoefle: Where are you?

Mr. Raskin: Now, we can play them together, play them where they can be heard right here.

Q. (By Mr. Wolff): Will you tell us what you are playing now?

A. Mr. Hoefle is going to play bar 14 of "The Blacksmith Blues" and I am going to play bar 14 of "Good Old Army".

(Testimony of David Raksin.)

(The piano was played.)

So it is perfectly obvious that in "Good Old Army" it has a single E-flat for four beats, and the other piece has seven different notes. The rhythm, of course, is completely different.

Q. Now, the portion of "Good Old Army" where it begins with the words, "Oh, many people think its rough"—

A. Yes.

Q. —what is the name for that portion of the piece?

A. Well, it is sometimes called the middle; sometimes called the release.

Q. Does the middle or release of "Good Old Army" correspond to the middle or release of "The Blacksmith Blues"?

A. There is no middle or release in "The Blacksmith Blues." There is no difference in form, if I can explain it.

Q. Do so.

A. The "Good Old Army" is written in what is called AA-BB form which means very simply that the first phrase [179] put in these songs happens to be eight bars fundamentally the same as the second eight bars, in other words, you got eight bars called B and eight bars called A again; then you have got a middle section which is also eight bars long, the so-called B, that is the release or middle; the last section is note A again. So in an ordinary tune, to make it simple, it is just like this (Witness plays on piano): the second section, which is A again;

(Testimony of David Raksin.)

then the third one, which is the release which would go this way (Witness plays on piano), which is different, and then you would come back to the A phrase again, which would be like this (Witness plays on the piano). "Good Old Army" has this form, AA-BA, it is an AA-BA song; whereas, "The Blacksmith Blues" is AA, change, which means it is a song of the eight bar first phrase and an eight bar second phrase. There is no middle at all in this song.

Q. Am I correct, then, Mr. Raskin, that the general structures of the two selections are different?

A. Quite different.

Q. Returning now to the first measure of "Good Old Army" and the first measure of "The Blacksmith Blues," that you have characterized, as I understand you, as a triad with a passing tone? [180]

A. Yes.

Q. Can you play the thematic material of "Good Old Army" or the first measure of "Good Old Army"? A. The witness plays piano.)

Q. Now, is that, to your knowledge, a common motif or phrase in musical composition?

Mr. Hoppe: Wait. We object to that, unless the music is put in evidence. Of course, we require the time and the place, and that is something an expert is not qualified to testify to without music.

The Court: I will overrule the objection. He may answer.

A. I have examples here, your Honor, and there is different combination of notes, not only as in the public domain. It is inescapable.

(Testimony of David Raksin.)

Q. (By Mr. Wolff): Inescapable?

A. Yes. All we have to do is to look at the number of examples provided in the two books which we use primarily as evidence, which are *The Standard Reference Works* by Barlow and Morgenstern and "A Dictionary of Musical Themes", both the orchestral and vocal, and I have written down each and every descriptive example which employ those notes both from the standpoint of pitch or tone and from the standpoint of rhythm.

Q. May I take out some of those and show them to counsel? [181]

The Witness: Here they are, if you want them, if you bring them back. I may want to use them again.

The Court: Are you through with him now, Mr. Wolff?

Mr. Wolff: No, your Honor. I want to show these two to him.

The Court: All right.

Mr. Wolff: And while counsel is examining them, I would have more.

Mr. Rudin: I might state that this phase of the direct examination which we might refer to as the historical phase of it will take more than five minutes, and I know your Honor's commitments. We would be most happy to continue, but we are not going to get through with this expert witness by 12:30.

The Court: I guess this is a good time to stop.

Mr. Rudin: Yes.



(Testimony of David Raksin.)

The Court: As I told you yesterday, when we made the arrangements, I said I would run to accommodate anybody, but the way Mr. Hoppe examined Mr. Schneider I am sure we are not going to get through with this gentleman in four or five minutes.

Mr. Rudin: I think it would be at least another hour.

The Court: How long is the rest of your defense going to take, Mr. Rudin?

Mr. Rudin: Well, we have just a short amount of [182] evidence to put on, on the defense.

The Court: Shall we start at 10:00 and then we will adjust our time during the noon hour?

Mr. Rudin: That will be fine.

The Court: In other words, tomorrow, if you gentlemen want to finish, we can all kind of take a short noon hour, if we have to.

Mr. Rudin: All right.

Mr. Hoppe: I think that would be excellent, your Honor.

Mr. Wolff: I am sorry, Mr. Raksin, but we couldn't finish in the time allotted.

The Court: No. You still want the piano now?

Mr. Rudin: Yes.

The Court: We don't care. We have the Naturalization proceedings here on Friday. What will we do with the piano Mr. Miller (The Bailiff), Friday morning?

Mr. Wolff: I believe that I can have it taken away on an instant's notice.



(Testimony of David Raksin.)

The Court: We will arrange about the piano tomorrow.

Mr. Rudin: But it can stay here tomorrow morning.

The Court: Have the piano here tomorrow morning. We will work that out. Counsel, we will run from 10:00 to 12:00 and then we will adjust our noon hour accordingly so as to try to get through.

(Whereupon an adjournment was taken until the following day, Thursday, September 19, 1957, at 10:00 a.m.) [183]

Thursday, September 19, 1957—10 A.M.

The Court: All right. Have the witness resume the stand.

Mr. Wolff: Mr. Raksin, just resume the stand that you were on yesterday, which is the piano stool.

DAVID RAKSIN,

resumed the stand on behalf of defendants, having been previously duly sworn, and testified further as follows:

Mr. Wolff: If your Honor please yesterday at the adjournment I had just shown to counsel several sheets on which music had been noted, which Mr. Raksin was about to use to testify as to what he called the unavailability, if I remember his word correctly, of the use of the particular phrase that was involved in the first measure of the plaintiff's song "Old Army" Blues, and I would like at this

(Testimony of David Raksin.)

time to have the Clerk mark these for identification. Had you had sufficient examination of those?

Mr. Hoppe: No. It would take me hours to look at those, counsel, so you proceed.

The Clerk: That will be Defendants' E marked.

The Court: E.

(Said documents were marked as Defendants' Exhibit E.)

Q. (By Mr. Wolff): All right now, Mr. Raksin, would you kindly play for the court and identify each one of the [186] selections that you are playing from these source materials which you have noted on your musical sheets which is Defendants' Exhibit E for identification?

Mr. Hoppe: May it please the court, we object to any testimony based upon Exhibit E for identification in so far as Exhibit E has not been proved. The chart, Exhibit E, is not the best evidence of what was in the public domain on April 7, 1941, and, hence, it is inadmissible except upon proof of the fact that the best evidence is unobtainable; furthermore, that there has been no testimony identifying this exhibit as purporting to be a faithful reproduction of that which was in the public domain on April 7, 1941; and for that reason, your Honor, we submit that the document is not admissible in evidence and that questioning based upon the document is not admissible in evidence.

The Court: I will overrule the objection.

Mr. Hoppe: May it be understood that my objection goes——

(Testimony of David Raksin.)

The Court: To all this line of testimony.

Mr. Hoppe: ——to the entire line of testimony based upon this exhibit.

The Court: All right. Yes.

Mr. Hoppe: All right; thank you.

Q. (By Mr. Wolff): Mr. Raksin, the selections that you have noted on Exhibit E, can you explain to us, sir, from whence they come? [187]

A. With possibly three exceptions they come from the two standard works in the field, "A Dictionary of Muscial Themes," by Barlow and Morgenstern, and a Dictionary of Vocal Themes, by Barlow and Morgenstern. These are the two works referred to in all library research frequently in adjudications.

Q. And how does one go about finding a selection in either of these two dictionaries?

A. There is an index in the back; there are actually two indexes. The important one is the notation index in which everything is reduced to the key of C which means that the notes are all written down in the index for identification as though they were done in the simplest and most direct key, which is C, so that if a piece goes—may I play?

Q. Please.

A. If a piece goes like this (Witness plays on piano), which is in the key of E, it would be very hard to identify for anybody looking at the index; they do it this way (Witness plays on piano), which is the same tune, as you can hear, but transposed so that it will fit in the index, so when you see ex-

(Testimony of David Raksin.)

amples, what you do, as you notice, you note that the tune "Waitin' For My Baby" goes (Witness plays on piano) and you look for those notes in the key of C which are these (Witness plays on piano), like that, so you [188] would look under C, C, E, E, G, G, and under C, E, G, and all the other notes, F, G——

Q. Is that the procedure that you followed in compiling the notes that appear on Defendants' Exhibit E?

A. This is the procedure I followed. Additionally, I chose examples which are in the popular music field which are not to be found in music themes.

Q. And in addition to your use of these two standard reference works, do you know, of your own knowledge, from your experience in the musical field of the selections that are noted on Defendants' Exhibit E?

A. Yes, I do.

Q. Do you know, sir, whether these, the notes that appear in the reference work are proper and correct copies of the originals of those selections?

A. Well, this is about as scholarly a work as you can find. There may be occasional slips of notations, sometimes, which will happen, but I have rarely found it, and they prefer to leave them out when they are not quite sure.

Q. All right. Now, Mr. Raksin, if you would, please play and identify the selections?

A. Well, I have a tremendous number of them, so I will just play until you stop me.

This is with regard to the first four notes, which



(Testimony of David Raksin.)

as I said, was inevitable in music, and this is [189] from Beethoven's Quartet in F Opus 135 (the Witness plays on piano). And then this one is from——

Q. Mr. Raksin, let me interrupt you. Do you have any idea as to the date of the Beethoven Quartet?

A. Oh, this was sometime in the 1800's. I don't know exactly when it was, but in any case I think that—would it be all right if I specified before nineteen—what is the date in question?

Mr. Hoppe: 1941 is the date in question.

Mr. Wolff: Well, place it as closely as you can, approximately. If you place it before 1900, that date I am sure will satisfy us.

The Witness: The dates of Beethoven I can look up here, but it would require time looking up.

Mr. Wolff: If you can just place it by the century? A. In the 1800's.

Q. And before 1900?

A. Before 1900, quite right.

Now, here is a piece from Glinka, an Overture called "Russlen and Ludmilla," and it is an overture and it starts this way (The Witness plays on piano).

Q. Would you place the Glinka selection, approximately in time? A. Before 1800.

Then, here is Beethoven "Pathetique" Sonata No. 8 [190] in G and that begins this way (Witness plays on piano).

Now, what I am doing here is giving examples which show the first four notes of "Waitin' For My



(Testimony of David Raksin.)

Baby” which are in this key (Witness plays on piano).

Here is one which has six notes, a composition by Ingelbrecht. It is called “Nurseries” and it goes like this (Witness plays on piano). The first notes, which have repeated notes in them, of course, are (Witness plays on piano).

And then now I am talking about the—actually the first four notes, also, in this one (Witness plays on piano).

Q. Will you place that selection in time?

A. That is around 1910.

Now I would like to skip over, because there are so many of these, and see if I can find some of the others.

Here is one which I think has—This is Gluck, date: 1714, died 1787, and this is from a composition called “*Iphigenia en Touride*” and it begins with the same first five notes (Witness plays on piano).

Then, here are some examples.

Oh, here is another one like that. This is by a man named Couillart, who lived in the 16th century, and it is called “*Viri Galilaei*” and it goes like this (Witness plays on piano). The rhythm is different, of course, but [191] the notes are there (The witness plays on piano); it has a missing note (witness plays on piano), the second note.

Now, I will give you a few samples which use the natural note, in other words, the difference, and I say a significant difference in “*The Blacksmith Blues*” which, as you know, differs immediately in this respect (The witness plays on piano), instead of

(Testimony of David Raksin.)

(witness plays on piano). And as I say, we consider this generations away in thinking.

This first one is by Poulenc, a composition called "Tel Jour, Tel Nuit", and it contains these notes—this work was written about 1930—(Witness plays on piano), you see, this note, (Witness plays on piano).

Then, here is another one, written by Vittoria, who died in 1611, and who was a liturgical composer, and it goes like this (Witness plays on piano). I will play that again (Witness plays piano).

Shall I play more?

Q. Well, I think you mentioned, Mr. Raksin, if I am not mistaken, that you have some sources other than old classical music, but rather popular music?

A. Yes.

Q. Am I correct?           A. I have, yes. [192]

This comes from a supplementary comparison chart made by Harold Barlow, who is one of the authors of these two works, and in the end of Mr. Barlow's supplementary comparison chart, which of course also has some others which I wish to play, he has the two popular versions of "When the Saints Go Marching In," which is a very well known spiritual.

Mr. Hoppe: May I interrupt here, your Honor, and make an additional objection to this exhibit, on the ground that part of it is hearsay?

The Court: I will overrule the objection. He may answer. We will try to stay away from hearsay.

(Testimony of David Raksin.)

Q. (By Mr. Wolff): Mr. Raksin, are you familiar with the song, "When the Saints Go Marching In"? A. I am, indeed.

Q. And the notes as written on what you described as a comparison chart, do they correctly show this song?

A. They are correct, and if I may explain what this means. There was a picture made not long ago called "Ink Alley Blues," and I think in the beginning of that they used "When the Saints Go Marching In" and in the form which is most applicable here. Originally, "When the Saints Go Marching In" was sung as rather a slow sort of a spiritual, and in that form it was done like this (witness plays piano). Now, you will notice [193] that the first four notes are the same first four notes of "Waitin' For My Baby." But in the days when I played in bands, and this is not simply hearsay, it is here if you can call it that, because I have heard this work played thousands of times, and it can be verified literally in the film and in the records, this is the way the colored band played it, and when they played funerals they always marched home, playing a fast march, and it went like this (the witness plays piano), and so on. Now, those are the notes, if you will listen to them. You have "Waitin' For My Baby," which goes like this (witness plays piano), and this one goes like this (witness plays on piano), or (witness plays on piano), and it would be done like this, with this kind of a base, which we call a "shuffling" base, they are

(Testimony of David Raksin.)

played either with a band base, which is (witness plays on piano), or they play like this (witness plays piano), like that.

That shuffling base rhythm or march, walk-march rhythm is one of the rhythms they used in that.

Mr. Barlow has made a comparison chart at the bottom of this which has——

Q. Mr. Raksin, I prefer that you confine your testimony to what you yourself—when you were illustrating the styles of playing “When the Saints Go Marchin In,” were you at that time testifying from your own knowledge? [194]

A. I am testifying from my own knowledge.

Q. That is as to how the march was played?

A. Yes, I was testifying from my own knowledge.

Q. All right. Proceed? I am sorry.

A. Now, as to the first few notes and the repeating of notes, Mr. Schneider used an example, which I also have down, which is the famous Mazurka “La Czarina,” by Ganne, and that has the dotted rhythm (witness plays piano); the whole composition goes (witness plays piano), like that. Now, this rhythm is a significant one (witness plays piano), so you have (witness plays piano), what I just played (witness plays piano) is “Waitin’ For My Baby,” and this is “La Czarina” (witness plays piano), like that.

There are other examples. There is a famous Symphony of Mozart, who was in the 1700’s, before



(Testimony of David Raksin.)

1800. It is Symphony No. 36 in C, K 425, it is the way you must identify them, and it is called "Linz" and it begins like this (witness plays piano), like that, with that same dotted rhythm.

There is an Overture, by Weber, who was in the 1800's, before 1900, called "Peter Schmoll," which has that same rhythm. It is written somewhat differently, but the effect is exactly as I will play it (witness plays piano), like that, you have these notes again (the witness plays piano). [195]

Q. Go back to the Mozart example, if you will, please, and play the first four notes of the Mozart selection?

A. (The witness plays piano.)

Q. Now, play the first four notes of "Waitin' For My Baby"?

A. (The witness plays piano.)

Q. Are those identical?

A. They are identical, yes. There is a small difference, which should be noted, and that is, in the case of "Waitin' For My Baby" which is in 4/4, the notes are—the time designations are dotted eighth note and 16th, dotted eighth note and 16th.

Here the designation is eighth note, 32nd rest, 32nd, eighth note, 32nd rest, 32nd rest. Now, I make this point because this is the look of the music.

In actual sound I do not believe that anybody can tell the difference at this speed, because at the tempo at which these works are presumed to be played which is let us say 120, which is the equivalent of what we call a 12-frame track of notes in very close



(Testimony of David Raksin.)

track, or 120 beats to the minute, the tempo goes like this: One, two, one two, one two, it is the same as the Marine March step (witness snaps fingers), and anybody that can tell the difference between a sixteenth note and a 32nd note at that tempo is a better man than I am, because it is like this (witness plays piano), and that is "When the Saints [196] Go Marching In," or it would be like this in 32nds (witness plays on piano). Now, the difference is absolutely infinitesimal. It exists really on the paper.

Q. All right, Mr. Raksin, any other examples that you wish to play?

A. Well, there is another comparison chart which you have seen, which I would like you to look at, which is the one which has the red notes, which shows where the actual similarity of notes exist.

Q. May I show this comparison chart to counsel. Is this one that has already been marked?

A. This has been marked.

Mr. Wolff: This is part of the exhibit, counsel, but it is not a series of other sources, and I will question, counsel, regarding this comparison chart.

Q. Mr. Raksin, did you prepare this comparison chart?

A. I did not. It was prepared by Mr. Barlow, the same gentleman I identified before as being one of the co-authors of these two standard references.

Q. Have you checked the comparison chart that you are now referring to——

A. I have checked it.

(Testimony of David Raksin.)

Q. —against both the sheet music of “The Blacksmith Blues” and the sheet music of “Good Old Army”? A. Yes, sir, I have. [197]

Q. And do you find that comparison chart correct? A. I find it correct, yes.

Q. Do you agree with the comparisons that are shown thereon?

A. I agree with the comparisons. There is one very confusing place in the notation. This was taken from “Waitin’ For My Baby,” that version of the song, and it has been noted as the composer apparently noted, set it down. It is correct in so far as the actual number of beats in the bar, but the notation is so complex that it would not be so noted by a musician.

Q. I see.

The Witness: But it is correct as noted on “Waitin’ For My Baby.”

Q. (By Mr. Wolff): And what does this comparison chart show?

A. This comparison chart undertakes to show where the actual similar notes are in “Waitin’ For My Baby” and in the “Blacksmith Blues” and the notes which are similar and which occur on the same beats are in red, so that they need not be understood as musical notes but seen as being exactly the same or different.

Q. How many notes in red, which are the similar notes, is that correct—

A. Yes. [198]

Q. How many notes in red are there on the comparison chart?

(Testimony of David Raksin.)

A. Well, over 16 bars, which means where the choruses are, where the choruses begin, in other words, the beginning into the upbeat. "Waitin' For My Baby" goes somewhat longer than "Blacksmith Blues," as we showed yesterday, and over these sixteen bars there are 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, with the possibility of two more which occur slightly differently, for which he has dotted lines showing, but they are more or less the same.

Q. And that is out of a total notes, or approximately how many?

A. Well, out of 16 bars—well, I can count them, which would be the best thing to do. There must be eighty—say 125 notes or so, or 140 notes.

Mr. Wolff: All right, Mr. Raksin.

Your Honor, we would like at this time offer Exhibit E——

The Court: All right.

Mr. Wolff: ——which has previously been marked for identification, in evidence.

Mr. Hoppe: Your Honor, we have no objection to it being received in evidence as illustrative of the testimony of the witness, but we do object to it being in evidence as factual testimony.

The Court: All right. I will overrule the objection. [199]

Mr. Hoppe: And we repeat our objection.

The Court: Yes. I overrule the objection, and let it be received.

The Clerk: Defendants' E in evidence.

(Testimony of David Raksin.)

(Said documents were received in evidence as Defendants' Exhibit E.)

The Court: Is that all now, Mr. Wolff?

Mr. Wolff: There is just one more short series of questions, if your Honor please.

The Court: Do you want him back on the stand, or do you want him to remain there?

Mr. Wolff: He can stay there.

The Court: He can stay there.

Mr. Wolff: He can stay there.

Mr. Wolff: It is not going to be piano questioning.

The Court: The reporter is right there, so it is all right.

The Witness: I would like to say that the gentlemen over here had told me that 103 notes exist in the frame of the chorus of "Blacksmith Blues," 103 notes.

Mr. Wolff: Thank you.

Q. Mr. Raksin, you have compared "The Blacksmith Blues" with the "Good Old Army," with the tune "Waitin' For My Baby," have you not?

A. I have. [200]

Q. Based upon your comparison and utilizing your experience and expert tune in the musical field, have you formed an opinion as to whether the composer of "The Blacksmith Blues" appropriated material from "Good Old Army" or "Waitin' For My Baby"?

Mr. Hoppe: May it please the Court, I object



(Testimony of David Raksin.)

to the question. It is not the province of an expert to decide the question at issue. That is a question for the Court.

The Court: He is just going to give his opinion, that is all. It is a matter of credibility.

Mr. Hoppe: I don't think it is a proper subject matter for a question.

The Court: It is a matter of credibility. He is just going to give his opinion. I will overrule the objection. You may answer the question.

A. It is my opinion that "The Blacksmith Blues" was not appropriated from "Waitin' For My Baby." It is a completely different song.

Q. (By Mr. Wolff): Can you explain and justify or explain how you reached that opinion, Mr. Raksin?

A. Well, it involves my appraisal of songs. I see hundreds of songs all the time in the Studio and sometimes with regard to publishing or recording, and it is the intent of a song which is important.

In "Waitin' For My Baby" you have a song which begins [201] obviously up, it starts with (witness plays piano).

Now, the way this song is written, the stress in it is evenly divided between the first phrases, by which I mean after the upbeats, the first four bars and the second four bars, so after you have played the first two bars which are like this (witness plays on piano), "Waitin' For My Baby" (the witness plays on piano), and then you go (witness plays on piano).



(Testimony of David Raksin.)

now, that, bars 3 and 4 are kind of a little answer to bars 1 and 2, and they are completely different in intent and content from "The Blacksmith Blues" which goes right away, presents its answer, goes (witness plays on piano); you see, in other words, "Blacksmith Blues" has a one-bar statement and a one-bar answer, another one-bar statement and another one-bar answer, another one-bar statement and another one-bar answer. By an answer I mean just precisely that, it goes down (humming); in other words, it answers itself right away. The song is written in a different way. Whereas, "Waitin' For My Baby" will have a two-bar statement or pairation and a two-bar answer.

And then, bars 5, 6, 7 and 8 are completely different and do this, which is not done in the other song at all, and introduce this flatted note; in other words, your key is here (witness plays on piano). like that (playing on piano), like that; in other words, that is [202] about as different as you can get from the similar bars here. I will play them both. First I will play "Waitin' For My Baby." bars 5, 6, 7 and 8, which I just played, which are like this (witness plays piano); and bars 5, 6, 7 and 8 of "The Blacksmith Blues" go (the witness plays piano). I played one note from bar 9 because that is where the tune resolves.

In the case of "Waitin' For My Baby" you finish on bar 8 and there is no carry-over into the next bar. It just finishes like this. I now play bars

(Testimony of David Raksin.)

7 and 8 (witness plays on piano), one, two, three and four, and then starts again; whereas, in the case of "The Blacksmith Blues," the bar 8 which is the bar which concludes the first eight bars and goes into the next eight bars, in kind of an 8-bar-8-bar form, goes like this (witness plays on piano) and laps over into this note (witness plays on piano) in bar 9.

The intent is different. You have the introduction of a triplet (witness plays on piano), like that (witness hums), that thing is called a triplet.

In other words, the songs are, in intent and content quite different.

Mr. Wolff: Thank you, Mr. Raksin. We have nothing further to ask you.

The Court: Mr. Hoppe, do you want to keep him over there? [203]

Mr. Wolff: One more thing: I would like to show Mr. Raksin Defendants' Exhibit B, please.

Q. Now, Mr. Raksin, I will show you a book of music entitled in French "36 Etudes Transcendantes," by Theo Charlier. I will ask the clerk to mark this next in order for identification.

The Clerk: Defendants' Exhibit F.

(Document marked Defendants' Exhibit F for identification.)

Q. (By Mr. Wolff): I will now show you page 1 of Defendants' Exhibit F and ask you whether or not the notes in the first two lines of Defendants'

(Testimony of David Raksin.)

Exhibit F correspond to the notes of Defendants' Exhibit B?

A. You refer to bars 1, 2, 3, 4, 5, 6, 7 and 8?

Q. That is correct.

A. They are exactly the same.

Q. So Defendants' Exhibit B is a correct copy of the first eight bars of the Charlier book, Defendants' Exhibit F?      A. Yes.

Mr. Wolff: If counsel doesn't object, I would like to ask the Court for permission to withdraw Defendants' Exhibit F at such time as is convenient——

The Court: All right.

Mr. Wolff: ——and we will photostat, if you prefer, [204] counsel. This is a borrowed copy from a trumpet teacher here in town, and I promised him faithfully that I would return it if at all possible.

Mr. Hoppe: Your Honor, we have no objection, and suggest that the photostat be made of the cover page and of page 1.

The Court: All right.

Mr. Rudin: Counsel, may we have the understanding that we can withdraw the book at this time, we will have the photostat made, send you a copy, and then mail it to the clerk?

Mr. Hoppe: Certainly.

The Court: All right. Mail it to the Clerk.

Q. (By Mr. Wolff): Mr. Raksin, would you play those first eight bars written in Defendants' Exhibit B which are identical, as I understand it, to number 1 in Defendants' Exhibit F?

(Testimony of David Raksin.)

A. Yes, sir. I will. (The witness plays on piano.)

Q. Can you now express an opinion as to whether or not the notes that you have just played bear a similarity to "The Blacksmith Blues"?

The Witness: They are almost——

Mr. Hoppe: Wait a minute. May it please the Court, we object to this question being answered, on the ground that that is not a proper province for expert testimony.

The Court: I will overrule the objection. He may answer. [205]

A. They are almost the same tune. In fact, when you showed it to me, I was flabbergasted. You see what happens in "Blacksmith Blues"; I will play them and you listen to them and you will see. This significant note, which is this note in "Blacksmith Blues" (the witness plays on piano), in this key (witness plays on piano), you see here does this (witness plays on piano) and keeps doing this. That is one of the things that differentiates it. This Frenchman, who was just writing a trumpet articulation exercise, wrote the same thing.

Now I will play this "Blacksmith Blues" eight bars. (The witness plays piano.) I would like to stop and play four, and then I will play the whole thing, just so you can see before it is forgotten. Now, here is the Charlier articulation exercise (witness plays piano); so, in other words, he is doing the same thing. The first bar goes (witness plays on piano), and here you got (the witness plays piano). Then he answers it in the second bar exactly the



(Testimony of David Raksin.)

same way (witness plays on piano). That is right, it is the same answer. I am sorry. I will play the first bar again (witness plays on piano).

“The Blacksmith Blues” answers itself this way (the witness plays on piano.)

Then, bars 3 and 4 of the Charlier trumpet exercise are like this (witness plays on piano). [206]

And in this, in bar 5—4, which is the important change, you modulate, which means that you indicate that you are going to make a change of key and instead of having this (witness plays on piano), you have this (witness plays on piano), you have (witness plays on piano), which both tunes do; (witness plays on piano) that means he is going into a new key, which he does in the next bar, and the Charlier trumpet exercise book goes like this (witness plays on piano). Now, that, the last bar in intent and in content is dissimilar, but before that—I will play these bars 5, 6, 7 and 8 again and then I will play “The Blacksmith Blues” and you will see how, having modulated, he stays in the new key just exactly like it. “Blacksmith Blues” does like this, this is the trumpet book: (Witness plays piano), and here is “Blacksmith Blues,” the second part, bars 5, 6, 7 and 8 (witness plays piano)—I beg your pardon. I am transposing and it is not easy. I would like to try it once more (witness plays piano). I am sorry it took a long while to do.

Q. (By Mr. Wolff): Now, Mr. Raksin, very briefly can you make the same comparison of the



(Testimony of David Raksin.)

Charlier exercise, which you have before you, with "Good Old Army" music?

A. Well, here you find the same situation that you have with regard to "Blacksmith Blues" and "Waitin' For My Baby", [207] if I may bring that in, by which I mean that, you see, in "Waitin' For My Baby", you have, after your upbeat—I will play—I will transpose them in the same key as the Charlier exercise—it goes like this (Witness plays on piano). Now, to begin with you have got this B-flat which does not occur in the Charlier, in which this key goes (Witness plays on piano). That note is different, (Witness plays on piano) in "Waitin' For My Baby" and in "Waitin' For My Baby" you have a two-bar phrase, as I said, which goes like this (Witness plays on piano); in other words, you have bars 1 and 2 and an answer in 3 and 4; whereas, in Charlier you have a bar 1 and an answer in bar 2, a bar 3 and an answer in bar 4; in other words, it is 1, 2, 1, answer 2, 3, answer 4; whereas, in "Waitin' For My Baby" you have the same general idea but it does not have this natural note. It has a flat note, as its fifth note, and it also takes two bars to answer itself, the answers in bars 3 and 4.

Q. Have you heard musicians play selections such as these exercises?

A. Well, all musicians do; they all have books of exercise like this. This one happens to be a trumpet one for articulation, which means to teach a

(Testimony of David Raksin.)

brass player when he should slur a note and when to tongue a note.

Q. Have you heard a musician jazz up one of these [208] exercises?

A. Yes. Not if his teacher is in sight. I have heard it.

Mr. Wolff: No further questions.

### Cross-Examination

By Mr. Hoppe:

Q. Do you want to stay there, please. Mr. Raksin?

The Witness: Yes, sir.

Q. (By Mr. Hoppe): Now, I would like to get to the difference in the style of music, first.

Now, as I understood your testimony, the statement in "Waitin' For My Baby" is two bars long and the statement is in bars 1 and 2, is it not, and in bars 9 and 10, if you look?

A. Yes. I think I will just check. Yes, I know it, but I just wanted to make sure.

Q. Yes. And then the statement is in bars 25 and 26?

The Court: A little louder, Mr. Hoppe.

Q. (By Mr. Hoppe): And then the statement is in bars 25 and 26?

A. Bars 25 and 26; 25 and 26, right.

Q. And so we always have a statement that is two bars long and they are spaced at odd intervals?

(Testimony of David Raksin.)

A. Well, they are spaced at appropriate intervals.

Q. Now, in "Blacksmith Blues" the statements are in bars [209] 1, 3, 5, 7, 9, 11 and 13, is that right? A. 1, 3, 5, 7, 9, 11 and 13, yes.

Q. And 15?

A. And 15, somewhat different.

Q. But it is a statement?

A. Well, yes. It is like a little coda, the ending.

Q. Now, you used the expression that in that trumpet solo one of the statements was modulated. What does that mean to a musician?

A. That means that the key changes; in other words, originally it started out, let's say the trumpet starts out on this key (Witness plays on piano); then it goes to here (Witness plays on piano), like that. Now, that is called the dominant of the original key. The original key is this (Witness plays on piano). The dominant is C (Witness plays on piano), in other words, it changes to the key of C, and it is based upon chords. As Mr. Schneider pointed out, it is like this, it is based upon a triad with a passing tone. The first triad is in the key of F (Witness plays on piano). The next one goes to the chord of C (Witness plays on piano).

Q. Now, to the listener, when the tone is modulated does it have the same physical manifestation to the ear and to the mind?

A. It does not. [210]

Q. It does not? A. It changes.

Q. It changes, but does the relationship of the

(Testimony of David Raksin.)

notes within the modulated phrase usually remain the same as the notes in the first phrase?

A. It does not, usually; but sometimes it does. If you wish, I can illustrate how the same notes can be completely different in another key, I mean in a song, the same notes.

Q. Yes.

A. There is a very, very famous song called, "The Man I Love", and it consists of the same notes and these notes are different every time because the key changes; it starts like this (Witness plays on piano). Now, the first three bars are the same notes, once he repeats a note, but these are considered by musicians to be absolutely different; although they are the same notes, the chord modulates. Here you have a thing where the same notes are considered different notes. The reason for this, if I can say without getting involved musicianly is that when you play it this way (Witness plays piano), it doesn't mean the same thing as when you go (Witness plays piano). This is a minor chord (Witness playing on piano). Then you go to another minor chord (Witness playing on piano). Of course, then you modulate and you [211] play the notes down to only one tone and it is completely different (Witness plays piano); again it is the same notes (Witness plays piano); they are different each time; again the same notes transposed down to one and they are completely different.

Q. That is to the musician, to the expert?

A. No. It is to people who hear them. I can't



(Testimony of David Raksin.)

presume to say what people hear, but I know that if this thing was the same all the time, it would be like this (Witness plays on piano), you see, like that. Now, I played it several times. Can you see those?

Q. Yes, I can see you got the mock piece the second time.           A. Precisely.

Q. And the other time you put a little variation in it?

A. No. What you did was actually change the music that the music develops.

Q. Now, will you please play all of the statement notes, I mean bars of "Waitin' For My Baby", which are 1, 2, 9, 10, 25 and 26?

A. (The witness plays piano.) I am sorry. I want to make sure. There is one different note. I will start again, if I may, at bar 1.

Q. All right. Bar 1.

A. Witness plays on piano.) That is bar 1 and 2. Now, we come to—— [212]

Q. 9 and 10?

A. (The witness plays piano.) There is a wrong note in here which belongs in a previous bar, and that is one of the things that was copied down. What was obviously meant, if I may presume, is not this beat like it should be on the downie (Witness plays on piano). I imagine that your client would agree that it is not meant to sound like this with two on the beat (Witness plays on piano). In other words, it would be "Let's Go Find a Parson, to Change



(Testimony of David Raksin.)

Your Name to Carson" (Illustrating), so they are roughly the same. There is an extra note.

Q. Now, would you please do 25 and 26?

A. (The witness plays piano.)

Q. Now, those are all of the statements of "Waitin' For My Baby", are they not?

A. That is right.

Q. Now I would like to have you play the statements from "The Blacksmith Blues", which are 1, 3, 5, 7, 9, 11, 13 and 15?

A. (Witness plays on piano), that is bar 1. Bar 3: (Witness plays on piano). Now, bar 5: (The witness plays on piano). Now, bar 7: (Witness plays on piano). You said 9?

Q. 9?

A. 9 (Witness plays on piano). Bar 11: (Witness plays on piano). [213] Bar 13——

Q. 13?

A. (The witness plays on piano.)

And bar 15 (witness plays on piano).

Q. Now, in the group of statements you have just played, those are all the statements of "The Blacksmith Blues," is that correct?

A. Precisely.

Q. Now, in the statements of bars 1, 3, 9, 11, you have your natural statement, is that right, the one in the original key of the song?

A. That is right, 1, 3——

Q. 9? A. Yes, 9, 11. That is right.

Q. And the statements of 5, 7——

A. 5, 7——

(Testimony of David Raksin.)

Q. —13 and 15—

A. —13 and 15 are the ones—

Q. —are modulated?

A. —in the modulated statements.

Q. Now, in all of the statements of “Waitin’ for My Baby,” the first tone is the two-note tone, is it not? A. That is right.

Q. And it consists of a dotted eighth and a sixteenth? A. Quite right. [214]

Q. That is true in each of them, is it not?

A. It is so.

Q. Now, in—

The Witness: Well, wait a minute.

Q. (By Mr. Hoppe): The first?

A. The first bar, you mean?

Q. Yes; the first. A. Bar 1.

Q. Bar 2?

A. No; not bar 2. Bar 2 is different.

Q. Is bar 2 different?

A. Yes. You see (witness indicates on sheet music).

Q. Oh, let me get the other piece of music then.

Mr. Rudin: What music do you intend to put in, counsel?

Mr. Hoppe: I want to refer to the “Good Old Army.”

Mr. Rudin: You are going to use the copyrighted version, are you not?

Mr. Hoppe: I am going to use both the copyrighted version and the version that was published—I mean distributed.

(Testimony of David Raksin.)

Mr. Rudin: Well, your Honor, to the extent that he uses anything but the copyrighted version, we have objection.

The Court: All right.

Q. (By Mr. Hoppe): I would like to call your attention to "Good Old Army" in the version which is Plaintiff's Exhibit 1 and the version which is Plaintiff's Exhibit 3. [215]

A. All right.

Q. Now, referring to Plaintiff's Exhibits 2 and 3 and to "The Blacksmith Blues," is it not true that in bars 1, 2, 9, 10, 25 and 26 the first tone of the statement comprises two notes having the same tonal depth, the same tonal quality let us say, and the timing of a dotted eighth and a sixteenth?

A. Quite right. Let me just check this, but I am sure it is the same.

Mr. Wolff: Will the reporter read that question?

(Record read by the reporter.)

The Court: And the answer was "Quite right."

Mr. Hoppe: Yes, that is as I understood the answer.

The Court: We will stop and take the morning recess at this time.

(Recess.)

The Court: All right, go right ahead. Do you want him back at the piano?

Mr. Hoppe: Yes, sir, if you please. No. I think he can take the stand.

(Testimony of David Raksin.)

The Court: Go right ahead.

Q. (By Mr. Hoppe): Now, Mr. Raksin, my notes indicate that I should have asked you this question. I will see if I did. I think we may have covered it, but I don't know, and that is, in bars 1, 2, 9, 10, 25 and 26 of Plaintiff's [216] Exhibits 2 and 3, the first note or first tone, let us say, of the question comprises two notes, the first having a value of a dotted eighth and the second having the same tone and the value of a sixteenth, is that correct? A. That is correct.

Q. Now, that same thing is true, is it not, of bars—I am going to call your attention to “The Blacksmith Blues”—of bars 1, 3, 5, 7, 11 and 15 of “The Blacksmith Blues,” is that correct?

A. Yes, it's also true of the Mozart Symphony and the Ganne piece and about thirty others I can point to.

Q. I will get to that later and ask for your best evidence on that particular point. Right now we are discussing the alleged infringement and the Plaintiff's pieces of music.

Mr. Hoppe: I move that the volunteered part of his answer be stricken.

The Court: It may go out.

Q. (By Mr. Hoppe): Now, with reference to bars 1 and 2 of Plaintiff's Exhibits 2 and 3, the second tone comprises two notes having the same tonal quality but having a timing of a dotted eighth and a sixteenth, is that correct?

A. That is correct.

(Testimony of David Raksin.)

Q. And that is likewise true in "The Blacksmith Blues," is it not, of bars 1, 2—no—bars 1, 3, 5, 11 and 13? [217]

Mr. Rudin: What is 2, Mr. Hoppe? Will you read that question?

The Witness: Will you please give me the bars again?

Mr. Hoppe: Do you understand the question?

The Witness: I did, but the last part of it I missed.

Mr. Rudin: Have the reporter read the question and I will have the benefit of it, too.

(Pending question read by the reporter as follows:

"And that is likewise true in "The Blacksmith Blues," is it not, of bars 1, 3, 5, 11 and 13"?)

Mr. Rudin: What is "likewise true"?

Mr. Hoppe: Will you please strike the question, Mr. Reporter.

Q. And it is likewise true in "The Blacksmith Blues" that in each question contained in bars 1—let me finish the whole question—bars 1, 3, 5, 9, 11 and 13, that the second tone comprises two notes having the same tonal quality, the first note having a length of a dotted eighth and the second note a length of a sixteenth? A. Yes; it is true.

Q. Now, what did you call the fifth note in Plaintiff's Exhibits 1 and 2 of bars—I mean Plaintiff's Exhibits 2 and 3—bars 1 and 2, the note that



(Testimony of David Raksin.)

connects the mi part with the sol part, what kind of a note did you call that?

A. That is called a passing note. It is the fourth of the [218] scale in the Plaintiff's exhibits—the fourth, the natural fourth.

Q. Yes. Now, in Plaintiff's Exhibits 2 and 3, the fifth note is the passing note as set forth in bars 1 and 2? A. That is right.

Q. And in bars 9 and 10, the fourth note is the passing note, is that right?

A. Quite right. It is right.

Q. And in bars 25 and 26 the fourth note is the passing note? A. That is right.

Q. Now, in each of the passing notes, the passing note of bars 1, 2, 9, 10, 25 and 26 has a value of  $1/8$ th, is that right?

The Witness: You are now speaking of "Blacksmith Blues" or——

Q. (By Mr. Hoppe): I am speaking of Plaintiff's Exhibits 2 and 3.

A. Oh, "Gold Old Army" and—yes, "Good Old Army" has the value of an eighth note.

Q. And in "Blacksmith Blues" the passing note has a value of  $1/8$ th in bars 1, 3, 5, 9, 11——

A. 1, 3—— .

Q. 3—— A. ——5, 9, yes.

Q. ——5, 9—— [219] A. 9.

Q. ——11—— A. 11.

Q. ——13—— A. 13.

Q. ——is that not correct?

A. That is correct.

(Testimony of David Raksin.)

Q. Now, what is the note following the passing note, what do you call that?

A. That is the fifth of the scale——

Q. That is the——

A. ——the sol; the fifth of the scale.

Q. All right. Now, in “Good Old Army,” Plaintiff’s Exhibits 2 and 3, the passing note is a quarter note, is that correct?

A. No, no. I think you mean that the next note is a quarter note. The passing note, you have already established that is an eighth.

Q. No. The note following the passing note?

A. Is a quarter.

Q. Is a quarter in bars 1, 2, 10 and 26?

A. 10 and 26. I know where it is now. Yes. In bar 26. Quite right.

Mr. Rudin: Your Honor, I make the same objection. As to Mr. Schneider, you overruled it, but I think it is [220] an imposition upon the court and upon counsel for the counsel to just simply take something and ask the witness to identify what is here and what is there. If he is trying to educate himself or if he has a hypothetical question he wants to ask, let him ask it, but he seems to be building up for 20 minutes, for what purpose I don’t know, excepting to say the same thing is here in bar 1 and as in bar 10, and this could go on, unless we had an IBM machine, for days.

The Court: Well, I will let him finish, Mr. Rudin. I imagine he is about finished.

(Testimony of David Raksin.)

Mr. Hoppe: This will only take about 15 minutes, your Honor.

The Court: All right.

Mr. Hoppe: I believe that they are points which will be very important in final argument.

The Court: All right; go right ahead.

Mr. Rudin: It is purely argumentative.

The Court: I will let him finish his point.

Mr. Ruiz: The point is, obviously, in urging the same objection, to indicate that there are four beats to a bar and so many quarter notes to a bar, and we are getting no further than simply trying to make up a mathematical computation, which is mathematics, and if we could stipulate in any way to shorten this fifteen minutes and help him [221] in his argument, I think we can do that.

Mr. Hoppe: I don't think we can, your Honor. I can't very well do that.

The Court: Well, he said he can't, and he wants to get it for his argument. I will overrule the objection. Go ahead.

Make it as brief as you can.

Mr. Hoppe: I will, your Honor. I believe it is very important.

The Court: All right. Go right ahead.

Mr. Hoppe: Will you repeat the question, Mr. Reporter?

(Question read by the reporter as follows: "Now, in 'Good Old Army,' Plaintiff's Exhibits 2 and 3, the passing note is a quarter note, is that correct?")

(Testimony of David Raksin.)

The Witness: No. We changed that.

Q. (By Mr. Hoppe): No. This is in the note following the passing note, the note is a quarter note?

(Record read by the reporter as follows:

“The note following the passing note is a quarter in bars 1, 2, 10 and 26?”)

The Witness: The answer was yes.

Q. (By Mr. Hoppe): Now, in “The Blacksmith Blues,” the note following the passing note is a quarter note in bars 1, 7, 9 and 13, is that correct?

A. 1, 7, 9 and 13—it is so in 1, 9 and 13, and it is not so in bar 7. [222]

Q. Which is the passing note in bar 7?

A. The passing note, if anything, is—there is no passing note in that bar, because the chords change. There is an A-flat in it, but the A-flat is now a regular note of the chord which is changed to B-flat seventh.

Q. Now, in bar 13 the passing note is connected to the note following the passing note—this is in bar 13 of “Blacksmith Blues”—by some form of indicia. What is that indicia?

A. That is a slur.

Q. And referring to Plaintiff’s Exhibits 2 and 3, in bars 10 and 26 there is likewise a slur connecting the passing note with the note following the passing note?

A. Would you please repeat those bar numbers?

(Testimony of David Raksin.)

Q. 10 and 26.

A. 10 and 26. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. I would like to say here that this slur is a completely different thing in these bars, because it's the slur in the bars of which you speak, in "Good Old Army," 1, 2, 3, 4, 5, 6, 7, 8, 9, it's in 9 and 10 and a couple of other places.

Q. 25 and 26?

A. Yes, it is certainly there, but the purpose of it is completely different. In the case of "Good Old Army" it's the kind of slur which allows one note to be sung—one word to be sung with two notes; in other words, it says "Marchin' a-long, a-long, Sing-in' a song"; whereas, in the "Blacksmith [223] Blues" the purpose of this slur is just a slur and there are two syllables, it says, "Folks love the rhythm, rhythm," in other words, the passing note is connected to the fifth by a slur, but that slur is completely different because there are two syllables on it, and the same goes for the next bar, "clang bang-in rhythm."

Q. But the slur is there in both cases?

A. The slur is there, but it is two different things, completely different things.

Q. Would you sing those slurs in say just bar 26 of "Blacksmith Blues"—or "Good Old Army"?

A. Bar 26, bar 26 of "Good Old Army"?

Q. Yes.

A. Well, I will count them: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26. There isn't a slur here.



(Testimony of David Raksin.)

Q. On 10? Is there a slur on 10?

A. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10. Yes, I cited it. "Sing-in', Sing-in' a Song"—

Q. Now, would you do it on bar 13 of "Blacksmith Blues"?

A. 13 of "Blacksmith Blues." 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13. "Folks love the rhythm." Two different syllables.

Q. Thank you.

Now, with reference to having the first tone [224] comprising in this question a dotted eighth and a sixteenth, both having the same tone value, but that different time value, in any of the exemplars which you have chosen as being in the public domain, do you find that precise timing, not the equivalent, but the precise timing of a dotted eighth and a sixteenth?

A. I have already said that as a musician we do not recognize any difference in audibility between a sixteenth and a 32nd, except at so slow a tempo that you couldn't play either of these pieces. Consequently, the Ganne one has a 32nd and this one has a sixteenth. They are to all intents and purposes the same. I can also demonstrate on the blackboard that certain other examples I have given are the same, exactly insofar as hearing goes. When in alla breve time, which Mr. Schneider called cut time yesterday, there appear in this sequence a dotted quarter and an eighth, in alla breve time which is a C with a line

(Testimony of David Raksin.)

through it. That is the same thing as a dotted eighth and a sixteenth, exactly, and there are examples.

Q. Now, would you say, outside of what is the same, and do you have—and I want a precise answer to this question and not an answer as to equivalents or what is the same to a musician, but I want it in black and white on some sheet music—do you know of any sheet music that [225] you have brought in court here in any of these books in which there is precisely shown on the first note a dotted eighth and a sixteenth?

Mr. Rudin: Your Honor, I object to that question as having been asked and answered and it is argumentative.

Mr. Hoppe: It has not been answered.

Mr. Rudin: May I complete the objection.

Mr. Hoppe: Yes, you may.

Mr. Rudin: It has been asked and answered. He just asked precisely the same question. The witness answered it in the only terms in which he could answer it as a musician. It is argumentative and there is no reason to impose upon an expert's time. It is argumentative cross-examination which doesn't come under cross-examination.

The Court: I will overrule the objection. You may answer.

The Witness: May I make my answer this way——

The Court: Yes.

(Testimony of David Raksin.)

The Witness: And then I will answer it any way you choose.

The Court: All right. Go ahead.

A. Let me say "oeuf" and "enough," or "huff" and "enough." Huff is spelled h-u-f-f. Enough is spelled e-n-o-u-g-h. And I defy anybody to tell the difference between "oeuf" and "huff" and "o-u-g-h" and "enough." They are the same thing. And o-e-u-f is French, oeuf, ough as we say it. These are the same things. Now, [226] there is among these examples an addition which I have made to Mr. Barlow's work to show how "When the Saints Go Marching In" is played, it is played exactly as you have said, and I have taken—I recognize I am under oath—I have written down there that it is played (Humming), like that (Witness hums). The fourth note is sometimes not played as dotted eighth and sixteenth, so I haven't taken the liberty of doing that, but the other one always is, the first four notes (witness hums), in other words, the E-flat and the G. Bands play it, that is how they play it, and I put my honesty behind it such as it is.

Q. (By Mr. Hoppe): I am not questioning that. What I am trying to find out is if in this published article that you have there—these books that you have, whether anyone has used this identical spelling, as you call it, of a dotted eighth and a sixteenth for the first note of the question?

Mr. Rudin: Your Honor, I am not aware that

(Testimony of David Raksin.)

the plaintiff is making any claim of originality of the methods of the musical spelling of notations. He has a copyright infringement action. I submit this type of kind of IBM approach to music isn't proper.

The Court: Well, Mr. Rudin, I will let him finish. I imagine he is about through. I will overrule the objection. [227]

A. Insofar as literal notation, exact notation goes, there is no exact duplication, but I say that insofar hearing goes there is no difference.

Mr. Hoppe: I move to strike the rest of the answer.

Mr. Rudin: You can't strike part of an answer by an expert who gives an expert answer.

The Court: I will let it remain. I will deny the motion to strike.

Q. (By Mr. Hoppe): Now, with reference to the second tone of the question, do you have any art, that you have there, any of the prior publications which you have charted, which literally and precisely have a dotted eighth and the sixteenth combined to make up the tone?

A. I would like to have the examples, if I may.

(Document handed to the witness.)

Well, I see one immediately. This example is Gluck who died in 1787, "Ipheginia en Touride." There it is, right there (Indicating in Exhibit E).

Q. Now, would you please go to your source



(Testimony of David Raksin.)

material and show us where that is in your source material?

A. All right. Would you like to see that a minute? Gluck's "Ipheginia en Touride." I presume this is what it is in reference to. (The witness refers to book.) Right here, right there (Indicating in book). [228] That is the third of the scale, C-sharp, and this key which is key of A-major, a G-natural, and the key of E-flat which is the key in the exhibit of "Good Old Army"—which exhibit is this one here—Exhibit 3, it is in E-flat and the second note, the third of the scale is designated as G-natural in this key which is A-major, third of the scale is C-sharp, and it is exact form, those two notes.

Q. And do they have the same quality?

A. The same quality, the same key, the same chord behind them and the same value.

Q. Now, this book was copyrighted in 1950?

A. Yes.

Q. Do you have anything here that was published prior to 1950 showing that tonal arrangement?

Mr. Rudin: Your Honor, I object to this type of cross-examination which misleads the Court and attempts to mislead the witness. and counsel knows better than that. That book is a compilation of classical works of music.

The Witness: The composer died in 1787.

The Court: Yes. I will sustain the objection.



(Testimony of David Raksin.)

Mr. Hoppe: Well, your Honor, I submit—I am going to ask one question to make my point.

Q. Do you know that the compiler of this book compared page 130 with the original? [229]

A. I am certain he could not have written it in any way than to compare it with a printed version. I am sure the original is not available, but this is the standard work used in copyright.

Mr. Hoppe: May I ask the question, your Honor, under Rule 43?

The Court: All right.

Q. (By Mr. Hoppe): This book was Copyrighted in 1950, was it not?

A. Yes; so it says.

Q. Yes. Do you have any work here that was published prior to 1941 containing that note arrangement?

A. Now, this—let me see—I am not qualified to pass on admissibility, out the lower eighth notes here, there is the second one of “When the Saints Go Marching In,” which is an old Spiritual, and which has been played dozens of times, copyrighted in various of arrangements by numbers of people, employing this thing.

Mr. Hoppe: Now, are we still under Rule 43, your Honor?

The Court: All right.

Q. (By Mr. Hoppe): Do you have with you any publication prior to 1941 having the note arrangement shown on your chart here on line 8?

Mr. Rudin: Your Honor, I understand this

(Testimony of David Raksin.)

question of [230] impeaching a witness. This man is an expert who knows music. He can read music. He has testified from his own knowledge. And counsel seems to take it as a magical thing that you have to have it printed in some book prior to 1941 in order for it to be in the public domain.

The Court: I will overrule the objection. You can make that argument for the purpose of the record. Let us finish with him.

The Witness: In other words, you want to know——

The Court: Are you about finished with him, Mr. Hoppe?

Mr. Hoppe: It will take me about ten minutes, your Honor.

The Court: All right. Go ahead.

A. I don't have any work here which has been printed. I have a compilation of works dated before that date.

Mr. Ruiz: If the Court please, we will stipulate that we don't have any works that are printed, if he is going to take ten minutes on this; and even if the original compositions were produced, if we were going to cross-examine further we would have to have the dead man here to say, "This is what I wrote down," in this type of cross-examination.

Mr. Rudin: We are willing to go to the Public Library, if that is what he wants, and drag out some of the Gluck [231] things, which he may find in some old editions, but when a man has died in

(Testimony of David Raksin.)

1787, to ask us to find an original manuscript, that would be asking too much.

The Court: I know.

Mr. Hoppe: Your Honor, we are not asking for the original manuscript to be produced.

The Court: Let us go ahead and finish. We are trying to get through.

Q. (By Mr. Hoppe): Now, in the work that you just called my attention to, the second note of the question is the first note of the bar, is it not, and it is not the second note of the bar?

A. It is indeed the second note—the first note of bar. I beg your pardon. It is the first note of the bar in the Gluck.

Q. And the prior note prior to that is located in the immediate prior bar and it is a single note, is it not?

A. It is a single note. It is called a pickup.

Q. Now, the works that you have brought here to authenticate your chart, one is a book published in 1950, Copyrighted in 1950; what was the date of the copyright of the other one, if you please?

A. 1948.

Mr. Hoppe: Now, one more question and I think we will be [232] through here.

Q. Do you have in the art that you have charged on your chart an example in which there is a slur between the passing note and the note following the passing note, any kind of a slur?

A. I am sorry to say that I have not copied down the slurs, for the very simple reason that

(Testimony of David Raksin.)

very rarely would a compiler, except in the case of vocal art, do such a thing. In other words, there I didn't bother with the slurs. I just wrote down the notes. And slurs must exist according to the law of averages. I just didn't bother with them. In fact, it is impossible to write music without having them. There is one slur here which goes to the following passing note, right here in the Brahms, a German requiem, a very famous piece; in fact, there are two, right there (Indicating) is a slur (witness singing): "How Lovely Is That Dwelling Place"—

Q. Now, in that particular piece that you have pointed out, the first note of the question is a half note, is it not?

A. You mean this (Indicating)?

Q. Here is the passing note (Indicating). What is that, a quarter note?

A. Now, look, the passing note is either this (Indicating) or this (Indicating) depending on what key it is in. [233] It is one of these three (Indicating). Now, these two notes (Indicating) are connected. This is a passing note (Indicating), C-sharp is a passing note. The B-natural is a passing note. The B-natural and the C-sharp are connected by a slur. And here (Indicating) is a passing note, an F-sharp, in the key of E—an F-natural in a key of E-flat.

Q. All right. Now let us compare this with the music that we are talking about in this lawsuit. In this Brahms piece of music, the note that you say compares to our first note is given as, what is that?



(Testimony of David Raksin.)

A. No. This is the note that compares with B-flat.

Q. Let us compare working notes. In Brahms, where is the note that corresponds to your work?

A. I don't think he wrote anything in his whole life.

Q. Well, this tone?

A. You mean the first note of the piece?

Q. Yes. A. Right here (indicating).

Q. And what value is that?

A. That is a quarter note.

Q. Compared to a dotted eighth and——

A. And a sixteenth.

Q. ——and the sixteenth of the plaintiff's music?

A. The same value of duration, by the [234] way.

Q. Now, the second note——

A. ——is a G, the same note or notes.

Q. Yes. What is its value here?

A. A half note.

Q. And what is the value in the plaintiff's piece of music?

A. A dotted eighth and sixteenth.

Q. And the third note in the plaintiff's piece of music is the passing note? A. That is right.

Q. What is the third note in this piece of music?

A. It is A-flat, the same note—wait a minute. The third note in the plaintiff's piece of music is G-natural. I beg your pardon. You mean the third real note, without repeating——

Q. Yes.



(Testimony of David Raksin.)

A. Is an A-flat; and there is an A-flat here (indicating), too, in Brahms.

Q. And would that be the passing note in Brahms?

A. Well, it is a passing note, if you are in E-flat. In other words, I am not trying to dodge your question. I don't know for sure. If this key changes here to an eighth—to a B-flat seventh, which it may do, this is not a passing note, but if it is in a key of E-flat, which it may very well be, it is indeed a passing note. [235]

Q. Now, the passing note, then, in Brahms is not connected with the following passing note, there is not a slur there?

A. For all I know, this (indicating) may be a passing note, or this (indicating), I can't say, but this note, this is an E-flat chord (indicating) for sure. Then that makes C a passing note, because that is not in the chord of B-flat. Then the B-flat, which is the fifth of the scale, is connected with the sixth, which is a C-natural, by a slur. The significance of this does not exist in music.

Q. Well, let us get on to spelling again, sir, and that is, there is no slur, is there, between what you would call the first, the second, the third note of the combination and the fourth note in Brahms, is that correct; the slur is between the fourth and the fifth notes?

A. One, two, three, four, five—it is between the fourth and fifth notes, quite right; and here (indicat-

(Testimony of David Raksin.)

ing), it is between the—one, two, three, four—fourth and fifth notes.

Q. Now, using your same language, that these two notes in bar 9 are one note or one tone, is that it?

A. Yes, but you have been spending all this time trying to prove that they are really not one; that they are (witness hums) like that. A dotted eight and a sixteenth [236] you can't suddenly change and say, "Now they are one note."

Q. Well, now, if you will follow your principle of music design, that the spelling of this is one note, two notes, three notes and four notes, and I am going to use your spelling now, there is a slur between the third and the fourth notes in "Good Old Army," is there not?

A. I cannot permit that. It is the same tone, it is the same tone but it is not the same note. In other words, if you are going to try to trip my evidence on the basis that these are the same things, that an E-flat, that since I can't give you an exact sixteenth and 32nd, then you can't suddenly come and say that a dotted eighth and a sixteenth are the same note just because you want to arrive at the fourth and fifth notes instead of the third and fourth. In other words, on that basis, it is the fourth and fifth notes—one, two, three, four, five. There is your slur; there is your slur.

Mr. Hoppe: No further examination.

The Court: Is that all?

Mr. Hoppe: That is all.

(Testimony of David Raksin.)

The Court: Any questions, Mr. Rudin?

Mr. Rudin: Just a few questions.

The Court: All right.

Redirect Examination

By Mr. Rudin:

Q. On the examples on that exhibit [237] which you have, which you copied out of Barlow and Morgenstern works, Mr. Raksin, are you otherwise familiar with those musical compositions?

A. Yes.

Q. And from your knowledge and memory of those musical compositions, were they properly noted in the Barlow and Morgenstern works?

A. Absolutely.

Mr. Hoppe: I move that the answer be stricken as not being the best evidence, your Honor. It is oral testimony.

The Court: I will let it remain. I will deny the motion to strike.

Q. (By Mr. Rudin): To your knowledge, are any of the original manuscripts available of some of those works of Gluck and Beethoven?

A. Some of them are.

Q. Where?

A. Well, they would be in Germany, they would be in collectors' places. Harvard has some, the Fleischer Collection——

Q. Mr. Raksin, is it also true that Beethoven's works are printed by many publishers, each of them having the right——

A. They are.

(Testimony of David Raksin.)

Q. The same applies to Gluck?

A. Absolutely. [238]

Mr. Rudin: That is all.

The Court: Is that all, Mr. Rudin?

Mr. Rudin: That is all.

The Court: Mr. Wolff, do you have anything?

Mr. Wolff: No.

Mr. Ruiz: Nothing.

The Court: Mr. Ruiz?

Mr. Ruiz: No.

Mr. Hoppe: I have just one more question, your Honor.

The Court: All right, one more.

#### Recross-Examination

By Mr. Hoppe:

Q. Are there compilations such as the books that you have there, that were published prior to 1941 that were available today?

A. With regard to the work of single composers, I think there are, like the Heiden Society was said to have published one and Albert Einstein did one for the Mozart Society, and there was one by Burroughs and Redmond, but I am not sure whether that was before 1941 or afterwards, I can't honestly say.

Q. And even though Beethoven and some of these other people are dead, there have been pieces of their music other than the original manuscripts, which were published prior to 1941, is that correct?

(Testimony of David Raksin.)

A. If you mean they have been printed in different ways. [239]

Q. Yes.           A. Yes.

Mr. Hoppe: That is all.

Mr. Rudin: That is all.

Mr. Wolff: May I ask the witness a few questions?

The Court: All right.

### Redirect Examination

By Mr. Wolff:

Q. (Mr. Raksin, would you now again seat yourself at the piano, and I will ask you, sir, whether the dotted eighth and sixteenth rhythm which appears in the first two bars of "Good Old Army" is an unusual rhythm musically?

A. Well, I have a number of examples here which I have played. Shall I play a couple of them again?

Mr. Wolff: Sure.

The Court: Well, we have heard that. Must we have it again?

Q. (By Mr. Wolff): Let us confine our consideration of this rhythm as jazz rhythm, popular music, are there any types of jazz rhythms that employ this dotted eighth and sixteenth?

A. Yes. There is a very famous one. It dates way back to vaudeville days. It is called a Shuffle, but it goes way back. It goes like this (witness plays on piano); they go like this (witness plays piano). Then [240] there is a Boogie Woogie beat.



(Testimony of David Raksin.)

Q. Rather than the Boogie Woogie, may I just ask you, the first example, it is played (humming): "Oom-pah, oom-pah, oom-pah," if that were written in music, could that be written in a dotted eighth and a sixteenth note and correctly represent the rhythmic pattern that you have played?

Mr. Hoppe: I object to the question.

A. That is exactly how it is written.

The Court: Well, I will overrule the objection. What is your answer?

A. It is exactly the way it is written, precisely the way it is written.

The Court: All right.

Mr. Wolff: That is all.

The Court: He said that is all, Mr. Hoppe. Do you have anything more? Your client is right there. Maybe she wants to have you ask a question.

Mr. Ruiz: I will have one question to ask.

The Court: All right.

### Redirect Examination

By Mr. Ruiz:

Q. Will you play a Boogie Woogie with a dotted eighth and sixteenth?

A. Yes. You play it in different ways, but a Boogie Woogie rhythm would be like this (witness plays on piano).

Mr. Ruiz: That is enough. [241]

The Court: That is all, Mr. Ruiz?

Mr. Ruiz: That is all.

(Testimony of David Raksin.)

The Court: Is that all, Mr. Hoppe?

Mr. Hoppe: That is all.

The Court: All right. The witness may be excused.

Mr. Wolff: Yes. And, your Honor, the piano will be removed.

The Court: Yes. All right. How many other witnesses do you have? That is all (addressing Mr. Raksin); you may be excused. Thank you.

Mr. Rudin: I would like to cross-examine the plaintiff again, as part of our defense, on the question of laches, briefly.

The Court: Do you think we ought to start at 1:30 rather than at 2:00 o'clock? What is your thought on that?

Mr. Rudin: I think at 1:30 would be best. We are pretty positive of finishing today.

The Court: Yes. Well, shall we make it 1:30?

Mr. Hoppe: Fine, your Honor. May I ask your Honor a question before we recess?

The Court: Certainly.

Mr. Hoppe: I would like to find out what your Honor's wishes are on oral arguments, whether they are to be now or at some other time, or by briefing? The reason for that is that if I can get away from here today, I have some [242] depositions I can take.

The Court: Why don't we do this: We will see how we get through this afternoon and if we have time for oral arguments, we will have them to accommodate you, and if we don't we will have them

on written memoranda. If we get through in time we will have some oral arguments this afternoon. If we don't, we will just have them on written memoranda. Is that satisfactory?

Mr. Hoppe: That is satisfactory.

The Court: Is that satisfactory to everybody here?

Mr. Ruiz: Yes.

Mr. Rudin: We can make short statements.

The Court: You say yes. We will see how we get along. We will start at 1:30.

(And, thereupon, at 11:55 a.m. on Thursday, September 19th, 1957, a recess was taken until 1:30 p.m. of the same day, Thursday, September 19, 1957.) [243]

Thursday, September 19, 1957—1:30 P.M.

The Court: All right. Mr. Wolff and Mr. Ruiz, who is going to be the witness?

Mr. Rudin: The next witness, we will call, as an adverse witness, the plaintiff in this action.

The Court: All right.

Mr. Fisher: (The Clerk): She has been sworn.

Mr. Rudin: She has been previously sworn.

The Court: Yes; she has been sworn.

MILDRED BECKER SCHULTZ

the plaintiff herein, called as a witness by the Defendants under the provisions of Rule 43(b) of the Rules of Civil Procedure, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rudin:

Q. Mrs. Schultz, you testified that somewhere in the summer, and you weren't sure about the date——

A. That is right.

Q. ——of 1952 that you first heard "The Blacksmith Blues" on television on Sid Caesar's, is that correct?

A. Yes, sir, that is right.

Q. And you also testified that thereafter you consulted an attorney in connection with your claim of infringement, is that right? [244]

A. That is right, sir.

Q. Do you recall the name of that attorney?

A. Mr. Paul McCarthy.

Q. And did Mr. McCarthy take any action on your behalf that you know of?

A. Not that I know of, other than to advise me to go and see Mr. George B. White.

Q. And how long after you saw Mr. McCarthy did you see Mr. White?

A. Well, as I recall at this moment, it must have been as soon as I could get up to San Francisco.

Q. In other words, a period of a week or two weeks?

(Testimony of Mildred Becker Schultz.)

A. No, sir. A period of maybe a day or so.

Q. In just a day or so; and then did Mr. White take any action on your behalf?

A. Well, first he took it under consideration to see, to examine the case, and then he offered me a contract in order to handle the case, but I think——

Q. Well, I don't want to get into relations between you and Mr. White. I want to find out when was the first time he took any action on your behalf?

A. Well, when he sent out a notification of an infringement.

Mr. Hoppe: We have the letter here, Mr. Counsel.

Mr. Rudin: Yes. Will you produce the [245] letter?

Mr. Hoppe: Yes.

Mr. Rudin: Thank you.

Q. Do you recall how long that was after you first consulted Mr. White?

A. My best recollection at this moment is that it was in a period of weeks.

Q. In other words, if we said that all of this took place within, say, about a month after you heard the song, that would be giving it a liberal period of time?

A. Well, as far as going to Mr. White, it was a period of days, but——

Q. I mean, from the time you heard the song until the time he sent the letter out claiming infringement, was that at best a month?



(Testimony of Mildred Becker Schultz.)

A. I don't recall the exact amount of time, but I was surprised that attorneys do look into things thoroughly before they take any action.

Q. That is not what I am trying to get at. I am trying to get at the time period. I know that you can't be exact about it. I am trying to find out whether it was a month, or six months, or six days, from the time you heard the song until the time he sent the letter out?

A. Well, it wouldn't be six days, I am sure.

Q. It would be closer to a month?

A. I am not sure how long a period of time passed before [246] he sent out that notification of infringement.

Q. Would it be six months?

A. Oh, no, sir.

Q. Three months?                      A. No, sir.

Q. Two months?

A. It wasn't two months, I am sure.

Q. About a month?

A. Approximately, at this time as best I can recall, it would be about a month.

Mr. Rudin: Do you have that letter, Mr. Hoppe?

(Mr. Hoppe hands document to Mr. Rudin.)

Mr. Rudin: I have a letter here from Mr. George B. White, addressed to Hill and Range Songs, Inc., Beverly Hills, California, and ask, do you represent to me and will we agree that this is the first letter sent out by Mr. White? Rather, it is a facsimile copy?

Mr. Hoppe: That is what we believe.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: And as a photostat of an original sent out, we ask that this be marked.

The Clerk: Defendants' G, next in order.

Mr. Rudin: Defendants' G.

The Court: All right.

(Said document was marked as Defendants' Exhibit G.) [247]

Q. (By Mr. Rudin): It is a letter, Mrs. Schultz, dated November 17, 1952. I would like to have you read that letter.

The Witness: The letter?

Mr. Rudin: Yes; just to yourself.

(Witness examines said letter.)

A. That is correct.

Q. Now, prior to Mr. White sending that letter, had you consulted with any experts to make a comparison of the songs?

A. I don't know if they were experts or not, but I consulted quite a few musicians.

Q. And who were they?

A. Well, there was the Brown's Music Company in San Carlos. That is one I am sure.

Q. Who is the gentleman there?

A. At this moment, I don't know whether he is Mr. Brown or not. He may be.

Q. He worked at this music store?

A. Well, he has an office in the back of it.

Q. Did he make any comparison sheets for you?

A. No. He looked it over.

(Testimony of Mildred Becker Schultz.)

Q. Did he talk to Mr. White, do you know?

A. No; not that I know of.

Q. Mr. White says, "It appears from the opinion of experts who compared the melody of the song published by you that the theme of the same was plagiarized from the portions marked [248] on the enclosed facsimile copy of my client's copy." Do you know who Mr. White was referring to when he says "experts"?

A. No, sir. I don't know who he took the song to.

Mr. Hoppe: I might tell you, for your information, counsel, that it was his partner.

Mr. Rudin: Are you willing to take the stand?

Mr. Hoppe: No. I am just trying to be helpful.

Q. (By Mr. Rudin): Now, Mrs. Schultz, until the time you heard this song on Sid Caesar's program, "Blacksmith Blues," is it your testimony that you never heard it played in any juke box before?

A. No, sir; I did not.

Q. Did you make any investigation after you heard the song as to how popular it had become?

A. No, sir; I didn't. I heard the song on the television and I ran down to the store for a copy of it, looked at the music and knew that it was my music.

Q. Did you inquire at the music store how long the song had been on the market?

A. Later on, after I became aware of it, I was informed that they had an aquacade at the Sequoia High School to the music and I never even knew about it, I never heard it.

(Testimony of Mildred Becker Schultz.)

Q. When was that acquacade? [249]

A. Some time, I don't know for sure—it was in that summer. Somebody told me. I didn't see it. I heard that it had happened.

Q. Did anybody tell you what recording of this song was the most popular recorded?

A. I believe, as I recall at this moment, that I became aware of it being so popular because I saw it in the Hit Parade.

Q. When did you see it on the Hit Parade?

A. I can't recall the exact time, but remember seeing them use it on Hit Parade.

Q. What Hit Parade was that?

A. Isn't that the Lucky Strike?

Q. Was it on television? A. Yes.

Q. You saw it on television, did you not?

A. Yes, sir; I did.

Q. On the Lucky Strike Hit Parade?

A. At this moment, I recall that it was.

Q. And was it one of the hits being played, or sometimes played standard or an extra, called "Lucky Strike extra"?

A. It wasn't an extra.

Q. It was a hit? A. It was a hit.

Q. It was on the Lucky Strike Hit Parade program? [250] A. That is right.

Q. How often did you see it on that program?

A. I don't recall how many times I saw it on the Hit Parade program, but I have watched it and it is some sort of a film on television where they are

(Testimony of Mildred Becker Schultz.)

striking an anvil in supposedly a blacksmith shop. I have seen it a couple of times I know of.

Q. Was that after the Sid Caesar program?

A. Yes, sir, because I wasn't aware of it until the Sid Caesar program.

Mr. Rudin: Do you have a letter, Mr. Hoppe, dated March 12, 1953, addressed to Hill and Range Songs, Capitol Records, and Tune Town Tunes?

Mr. Hoppe: Yes; I do.

Mr. Rudin: Your Honor, we have a letter addressed to Hill and Range Songs, Capitol Records and Tune Town Tunes, dated March 12, 1953, sent out by Mr. White. Please mark it.

The Court: All right. Mark it.

The Clerk: Defendants' Exhibit H marked.

The Court: H.

(Said document was marked as Defendants' Exhibit H.)

Q. (By Mr. Rudin): Now, between November 17, 1952, and the time of sending Defendants' Exhibit H on about March 12, 1953, do you know what action Mr. White took to enforce your [251] claim?

A. He sent several letters to your office for which I understood, my best recollection at this moment is that he didn't receive any proper answer to it.

Q. When you say our office, whose office are you referring to?      A. Gang, Kopp & Tyre.

Q. Well, neither of these letters are addressed to Gang, Kopp & Tyre that I called your attention



(Testimony of Mildred Becker Schultz.)

to. This is the second letter, to Hill and Range Songs, to Capitol Records and Tune Towne Tunes. Do you know of any correspondence between November, 1952, and March, 1953?

A. Yes; I do. There were several letters, I believe.

Mr. Rudin: Does counsel have them?

Mr. Hoppe: Yes.

Mr. Rudin: May I have them?

Mr. Hoppe: You may. What was the date interval?

Mr. Rudin: November, 1952, and March 12, 1953.

(Mr. Hoppe hands documents to Mr. Rudin.)

Mr. Rudin: Now, these you have handed to me we can treat as one exhibit, if you wish. Here is a letter dated December 4, 1952, to Mr. White from Leo D. Harman, Jr., of Capitol Records.

The Court: Make it one exhibit?

Mr. Rudin: Yes.

The Court: All right. [252]

Mr. Rudin: And Mr. White's reply.

Mr. Hoppe: Yes, if you please.

The Clerk: Defendants' Exhibit I marked.

(Said documents were marked as Defendants' Exhibit I.)

Mr. Rudin: Is there anything else, Mr. Hoppe?

Mr. Hoppe: Between those dates?

Mr. Rudin: Yes, sir.

Mr. Hoppe: No; not that I have here.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: On the second page of Defendants' Exhibit I is a letter of January 27, 1953, to Capitol Records, Inc.

Mr. Hoppe: I beg your pardon. I do have one more.

Mr. Rudin: I thought there would be one.

Mr. Hoppe: Yes.

Mr. Rudin: Let us have the copy of the letter from Mr. White to Capitol Records, dated November 20, 1952, marked as Defendants' next in order.

The Clerk: Defendants' Exhibit J marked.

(Said document was marked as Defendants' Exhibit J.)

Q. (By Mr. Rudin): So we have, Mrs. Schultz, to cover the sequence of events, a letter of November 20, 1952, to Capitol Records from Mr. White, in which he makes a claim from profits of Capitol Records; the Capitol Records reply, which is a part of Exhibit I, of December 4, 1952, referring [253] Mr. White to Tune Towne Tunes, stating that Tune Towne Tunes licensed the recording and, therefore, the claim should be referred to them; and then Mr. White's reply of January 27, 1953. Is there anything else that you know that Mr. White did between those dates about enforcing your claim?

A. Well, I know he wrote to the Secretary of State to find out if Tune Towne Tunes were a corporation, and he did send me a letter asking me if I recognized some certain names.

Q. I don't want to get into conversation between

(Testimony of Mildred Becker Schultz.)

you and your attorney. There is nothing else you know he did about setting forth your claim to the parties?

A. Well, I know that he wrote letters and waited a period of time to receive an answer. Then he would write another letter and wait a period of time.

Mr. Hoppe: Counsel, I will give you this whole set of correspondence. You may take all of it.

Mr. Rudin: May I have a moment, your Honor?

The Court: Certainly.

(A short intermission.)

Mr. Rudin: They are in reverse chronological order. Well, this isn't the original. I will agree that the original of this copy was a letter sent by the firm of Gang, Kopp & Tyre to Mr. White, dated March 20, 1953, [254] and ask that that be marked as Defendants' Exhibit next in order.

The Court: All right.

The Clerk: It will be Defendants' Exhibit K marked.

(Said document was marked as Defendants' Exhibit K.)

Q. (By Mr. Rudin): Did you ever see this Defendants' Exhibit K before, Mrs. Schultz? Mr. White informed you he had received this letter?

A. Yes; I do recognize it.

Q. And Mr. White informed you that he had received that letter?

A. I believe he sent me a copy of it.

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: I ask that this next letter be admitted as Defendants' Exhibit next in order, a letter from Mr. White to Mr. Norman R. Tyre, dated March 31, 1953, to which is attached some music referred to in the letter.

The Court: All right. It may be received.

Mr. Rudin: In evidence, your Honor?

The Court: Yes; that is right.

(Said document was received in evidence and marked as Defendants' Exhibit L.)

Mr. Rudin: All of these are in evidence, these last few?

The Court: Yes; all of them are received in evidence, [255] Mr. Rudin.

(Said documents, heretofore marked as Defendants' Exhibits G, H, I, J and K, were received in evidence.)

Mr. Rudin: Marked and all admitted in evidence; may we have them all received?

The Court: Yes; received in evidence.

The Clerk: The last one is Defendants' Exhibit L.

Mr. Rudin: The next document to be admitted in evidence is a letter dated April 20, 1953, from Norman Tyre of Gang, Kopp & Tyre to Mr. George B. White.

The Court: It will be received.

The Clerk: Defendants' Exhibit M in evidence.

(Testimony of Mildred Becker Schultz.)

(Said document was received in evidence and marked as Defendants' Exhibit M.)

Q. (By Mr. Rudin): Now, would you look at Defendants' Exhibit M, Mrs. Schultz, and let me know if you read that on or about the time it was sent to Mr. White? A. Yes.

Q. Did you read the letter or did Mr. White send you a copy of it along about the time he received it, April 20, 1953?

A. I can't recall the date he sent it to me, but I remember reading it.

Q. Was it shortly around the time this correspondence was going on? [256]

A. My best recollection is that, at this time, as soon as he received a letter he sent on a copy to me.

Q. You were aware, then, some time around in the early part of 1953 that as far as Hill and Ranges Songs is concerned, it had taken the position that there was no access to your song, that there was no infringement and that the songs were not in any way alike, comparison had been made and your claim had been rejected, you were aware of it around that date, that Hill and Range had rejected your claim of infringement?

A. If that is the date that I received that letter, then I was aware of it.

Mr. Hoppe: As a matter of law, she was anyway, counsel.

Mr. Rudin: I accept that stipulation.

Q. Now, was your song, either "Good Old



(Testimony of Mildred Becker Schultz.)

Army" or "Waitin' for My Baby," ever performed in Los Angeles or in Hollywood?

A. Do you mean performed before an audience?

Q. Or any particular place; where was it performed?

A. I don't know. I don't remember of it having been performed publicly.

Q. Privately?

A. I do not know what happened to my song after I left it.

Q. You were never present in Los Angeles and in Hollywood [257] when your song was performed?

A. I did not hear in played, in person.

Q. Now, on or about April of 1953, did you have any information as to the financial reliability or standing of Tune Towne Tunes?      A. April?

Q. Yes.      A. Of '53?

Q. That is right.

A. Mr. Rudin, I have to think back to realize what was going on about that time, to know.

Q. The date of the letter, that letter from Mr. Tyre to Mr. White was dated April 20, 1953, and I am talking about that period.

A. About that period, my best recollection was that I was aware of the fact that it was a very good song and had made quite a standing. As far as the financial end of it is concerned, to this day I don't know how much it made.

Q. Did you ever tell Mr. White or furnish him with any information of the song or request him to

(Testimony of Mildred Becker Schultz.)

make a claim that your songs had been performed in Los Angeles and in Hollywood?

A. I remember the letter you are referring to, Mr. Rudin, but I did not tell Mr. White that at all. I let Mr. White do his own research. [258]

Mr. Rudin: I have the original letter, but it has some of my handwritten notes on it.

The Court: All right.

Mr. Rudin: So I will use a copy Mr. Hoppe gave me.

The Court: Use a copy.

Mr. Rudin: Being a letter of April 21, 1953, to Gang, Kopp & Tyre from George B. White.

The Court: That will be satisfactory.

Mr. Rudin: It will be admitted in evidence as Defendants' Exhibit next in order?

The Court: Yes.

The Clerk: Defendants' Exhibit N in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit N.)

Q. (By Mr. Rudin): You are then familiar with this letter, are you not, Mrs. Schultz?

A. From what you said, it's—yes. I am familiar with that letter.

Q. And you have no information within your knowledge to support the statement contained in this letter that your song was performed in Los Angeles and in Hollywood?

A. Not in Los Angeles and Hollywood. I don't know where Mr. White got his information, be-

(Testimony of Mildred Becker Schultz.)

cause I didn't tell him about Los Angeles and Hollywood, but I knew that it was performed in San Francisco. [259]

Q. Do you have any information as to the "reliable musicians" referred to in the third paragraph of his letter, who he is referring to?

A. I don't know who Mr. White contacted.

Q. Did you ever tell Mr. White or furnish him with any information that the members of the partnership of Tune Towne Tunes were involved in unsavory difficulties and left town?

A. I remember that letter also, sir. I believe Mr. White described it as a "smoking out" process, due to the fact he couldn't get an answer, and that is all I know about it. I didn't furnish any information. What Mr. White did on his own and what he learned on his own he didn't tell me.

Q. In other words, you have no information as to the truth of the statement contained in one of his letters in which he said, "A source which was represented to me as being reliable, calls to my attention the fact that the members of the partnership of Tune Town Tunes was involved in unsavory difficulties and allegedly left town"?

A. I have no information to that effect. I turned the case over to Mr. White. He did his own investigation. I don't know where he got his information.

Q. Are you aware that Mr. White once made the statement in one of his letters and said, "It was also represented [260] to me that your clients as

(Testimony of Mildred Becker Schultz.)

well as Capitol Records were negligent in general in not obtaining proper clearance on the songs in connection with which they entered into a contract with Tune Town Tunes”?

The Witness: Would you repeat that statement, Mr. Rudin?

Mr. Rudin: Well, let me have this letter marked in evidence and then I will question you about it. Will you concede that this letter is a true copy?

Mr. Hoppe: All right.

Mr. Rudin: Again, Mr. Hoppe, we stipulate that the copy of a letter to Gang, Kopp & Tyre, dated May 19, 1953, from George B. White, may be used in place of the original.

The Court: All right.

Mr. Rudin: As Defendants’ Exhibit next in order and admitted in evidence.

The Court: All right.

The Clerk: Defendants’ Exhibit O in evidence.

(Said document was received in evidence and marked as Defendants’ Exhibit O.)

Q. (By Mr. Rudin): I will let you read that letter and I will call your attention to the third paragraph, which I have just read before, in which Mr. White stated:

“It was also represented to me that your clients as well as Capitol Records were negligent in general in not obtaining proper clearance on the songs in [261] connection with which they entered into a contract with Tune Town Tunes.”



(Testimony of Mildred Becker Schultz.)

A. Mr. White was a copyright attorney. I figured he knew his business. I turned the music and the copyrights over to Mr. White.

Q. And you are not the source of the information that he had along that line?

A. No, sir; I am not.

Q. Calling your attention to the fourth paragraph in which he states:

“My client also advises me that it is her recollection that she left a manuscript copy with Tune Town Tunes in Los Angeles, when she approached them many years ago for the publication of her song.”

Did you ever tell that to Mr. White?

A. Yes; I did tell him. It was my best recollection, but not knowing Hollywood and having doubts about the company and knowing where I left it, I was under the impression it could have been at the address on Santa Monica Boulevard.

Q. Did you tell Mr. White it could have been or did you tell him that it was there?

A. I told him that it could have been, that I could have left it over on Santa Monica Boulevard.

Q. You are now satisfied it was not Tune Towne Tunes? [262]

A. I have not been able to locate that building on Santa Monica Boulevard or anybody that was there. I do not know where the Tune Towne Tunes had their place of business up until I found out that it was at 6700 Sunset Boulevard. I don't know where their place of business was, and at that time



(Testimony of Mildred Becker Schultz.)

I was under the impression that it might have been on Santa Monica Boulevard.

Q. Do you know whether Mr. White ever received a reply to that letter?

A. Yes; I believe I do recall a reply.

Mr. Rudin: Mr. Hoppe has agreed that I can put in evidence as Defendants' Exhibit next in order our office carbon copy of a letter of May 22, 1953, from Mr. Tyre of our firm to Mr. George B. White.

The Court: All right.

The Clerk: Defendants' Exhibit P in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit P.)

Q. (By Mr. Rudin): Did Mr. White send you a copy of this letter, Mrs. Schultz?

(The witness examines said exhibit.)

The Witness: May I see the next page?

Mr. Rudin: Yes.

(The witness further examines said document.)

A. I remember that letter. [263]

Q. And you are aware that Mr. Tyre informed Mr. White that he must be referring to other parties, because, as Mr. Tyre said, "from our experience which we have had with Tune Towne Tunes, these people have been completely reliable and to our knowledge have never been involved in any un-

(Testimony of Mildred Becker Schultz.)

savory difficulties. I am certain that you are confused as to the parties since Tune Towne Tunes has for the past several years been continuously in business in Los Angeles and is now so engaged." Did Mr. White discuss that statement by Mr. Tyre?

A. My best recollection at this moment is that at the time Mr. White couldn't get an answer from the Tune Towne Tunes and from all the information he could get was that they were supposed to be a corporation, but he wrote a letter to the Secretary of State, on which he was informed that they did not file Corporation papers, and I have no idea exactly where he got all his information.

Mr. Rudin: Now, counsel has agreed that we can put in evidence as next in order a letter of May 25, 1953, from Mr. White to Gang, Kopp & Tyre.

The Court: Yes. It may be received.

The Clerk: Defendants' Exhibit Q.

(Said document was received in evidence and marked as Defendants' Exhibit Q.) [264]

Q. (By Mr. Rudin): Did you see this letter, Mrs. Schultz, or a copy of it? A. Yes——

The Court: Your answer was "Yes"?

The Witness: What was the question again?

Q. (By Mr. Rudin): Did you see this letter or a copy of it, on or about the time it was sent, on May 25, 1953?

A. I presume that this particular letter was in my hands—I mean, he sent a copy of it to me.

(Testimony of Mildred Becker Schultz.)

Q. Yes. Calling your attention to this last paragraph of this letter, dated May 25, 1953, "At any rate I am submitting this whole correspondence to my client for decision as to the filing of infringement action in the matter."

The Witness: May I read it myself, please?

Mr. Rudin: Yes, certainly.

A. It confuses me (the witness examines said letter). If you are asking me did I see this letter, my answer is yes, sir.

Q. You did see that letter? A. Yes, I did.

Q. Did Mr. White do just what he said he was going to do in the third paragraph of the letter?

A. Mr. White did not file the suit.

Q. I see. You discussed the matter with [265] him in discussions with him.

Do you know if he had any further correspondence after that date?

A. I know that he had a further correspondence, but I have never seen the letter.

Mr. Rudin: Does counsel have anything other than this letter of June 1, 1953?

Mr. Hoppe: That is all that I received. I gave you my file, counsel.

Mr. Rudin: All right. Then your file is missing this letter (indicating document). I will put it in, if you agree to it, from our files. I make a representation that this letter was a carbon copy sent to us by Mr. Carl Hoefle on or about the time he wrote to Mr. White on May 26th, 1953.

(Testimony of Mildred Becker Schultz.)

Mr. Hoppe: And with that representation, it may go into evidence.

The Court: I will let it be received.

The Clerk: Defendants' Exhibit R in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit R.)

Mr. Rudin: And may I now use counsel's own copy of a letter that Mr. White sent to Mr. Manuel Ruiz, dated June 1, 1953?

Mr. Hoppe: Yes; you may. [266]

Mr. Rudin: May that go in evidence as Defendants' Exhibit next in order?

The Court: It will be received.

The Clerk: Defendants' Exhibit S in evidence.

(Said document was received in evidence and marked as Defendants' Exhibit S.)

Mr. Rudin: To move along, Mr. Hoppe, is there any other correspondence with other counsel?

Mr. Hoppe: I don't have any.

Mr. Rudin: We don't have any, either.

Mr. Hoppe: No; I haven't seen any.

Q. (By Mr. Rudin): Did you see this copy of Mr. Ruiz's of June 1, 1953, a letter from Mr. White?

The Witness: Is that to Mr. Manuel Ruiz?

Mr. Rudin: Yes.

The Witness: May I look at it?

Mr. Rudin: Yes, certainly; please.

(The witness examines document.)

(Testimony of Mildred Becker Schultz.)

Mr. Rudin: Do you have the original file, Mr. Clerk?

The Court: Have you about all of the correspondence in now, Mr. Rudin?

Mr. Rudin: Yes. The next thing is on the Complaint and I am through.

The Court: Do you want the date the Complaint was filed?

Mr. Rudin: That is right. I have it here now. April [267] 29, 1954.

The Witness: What was your question about this letter, Mr. Rudin?

Q. (By Mr. Rudin): Did you know that Mr. White had sent that letter to Mr. Ruiz?

A. Yes, sir; I did.

Q. Were you aware of his sort of an apology for what he regarded as a libel of Tune Towne Tunes?

A. I was aware that he had received a letter from Mr. Ruiz and he sent this letter in the form of an apology, at least that is what I understood at the time, for what he might have said.

Q. And you are aware of the last paragraph of his letter:

"I want to assure you again that in corresponding in the matter I merely perform my duty to explore the possibilities of amicable settlement before I submit the matter to my client for a decision about filing a suit on account of the infringement of her copyright."



(Testimony of Mildred Becker Schultz.)

The Witness: What was the question you asked me?

Q. (By Mr. Rudin, continuing): You were aware of that paragraph of that letter?

A. Yes, sir; I was.

Q. And did Mr. White submit the matter to you on or about that time?

A. You mean as to whether to file suit? [268]

Q. For decision as to whether to file suit?

A. He considered filing suit.

Q. But he advised you of that paragraph of that letter? A. Yes, sir; he did.

Q. Did he advise you of any subsequent correspondence in this matter?

A. What do you mean by that, like any other correspondence?

Q. Well, after the letter from Mr. Ruiz, did he hear anything further from anybody and tell you about it?

A. My best recollection is about that time of the letter, a new attorney wanted to take the case up, because time was going on and there was nothing being done.

Q. Can't you limit yourself to answering the question? Did he advise you about any further correspondence after June, 1953?

A. My best recollection is that I don't remember any other.

Q. Well, then, did you ever see this Complaint which is in the file? Well, I assume that is authorized, your Honor. I only want to note at this point

(Testimony of Mildred Becker Schultz.)

for the record that this Complaint was filed April 29, 1954.

The Court: Yes.

Mr. Hoppe: Is that the one that was filed in San Francisco?

Mr. Rudin: Yes, and it was subsequently transferred here [269] and the September date is the date of the transfer.

The Court: Yes. "August 21" is the date on here.

Mr. Rudin: It was not the date it was first assigned to your Honor.

Mr. Hoppe: That is right.

Mr. Rudin: I have no further questions of this witness, your Honor.

The Court: Do you want to examine her on this question?

Mr. Hoppe: Yes.

### Cross-Examination

By Mr. Hoppe:

Q. Mrs. Schultz, between June of 1953 and April of 1954, you employed other counsel, did you not?

A. I had a Mr. McCarthy, but I have to think of the dates.

The Court: Well, it is true that you did make a switch in there?

A. Yes.

The Court: That is all right. He just asked you.

The Witness: Yes.

Mr. Hoppe: That is all.

The Court: Is that all?

Mr. Ruiz: No questions.

The Court: Do you have another witness? Well, shall we stop and take a little recess?

Mr. Rudin: Well, your Honor, I don't know whether Mr. Hoppe [270] may discuss this from the floor. Mr. Hoppe, I would be the next witness, not as to a very important material fact, but the only submission was to Schumann Music Corp., addressed to 1411 N. Serrano Ave. I am referring to Defendants' Exhibit A, postmarked "Aug. 4, 1941," and it is marked "Refused" in pencil, and it is marked "1911 N. Serrano," and I would be in the strange circumstance of testifying as to this word "Refused."

Mr. Hoppe: That is all right. I have no objection to counsel testifying.

The Court: He will take your word for it.

Mr. Rudin: May I make a short statement, please?

Mr. Hoppe: If I may ask you a question on it.

Mr. Rudin: Yes. I might as well explain that at that time I was living with my cousin, Walter Schumann, who published the song called the Hut Sut Song. He was about to go in the Army and I was about to go to law school. He never published a song before. It took off as a tremendous hit and we were busy working out an analysis on sheet music and trying to get it published and trying to run a music company without knowing how, and along came about two hundred or three hundred

letters similar to this pertaining to songs; and without legal training, I wrote on all of them "Refused" and gave them back to the Post Office and this I recognize as my [271] handwriting.

The Court: All right.

Mr. Rudin: And the envelope was not opened, and "Refused" and mailed back.

The Court: All right.

Mr. Hoppe: We have no objection to that testimony.

The Court: All right. May the witness step down?

Mr. Rudin: Yes.

The Court: Well, we might stop and take about a ten-minutes recess.

(Recess.)

The Court: Are we ready now?

Mr. Rudin: Yes. Upon talking to Mr. Hoppe during the recess, the only additional evidence as far as the defendants we represent are concerned I would like to put in would be either by deposition or it may be Mr. Hoppe would stipulate without the evidence relating to when "Blacksmith Blues" was on the Hit Parade, when it was on the Hit Parade in San Francisco. I think we can get a statement on that and file a stipulation.

The Court: Yes, and you can just incorporate that in the record, is that it?

Mr. Rudin: And incorporate it in the record, and if we can't do it by stipulation we will file the originals of the depositions. [272]

Mr. Hoppe: That is all right with me, your Honor. I think we will be able to get together on it.

The Court: Yes. That is all right. Just file it.

Mr. Rudin: We will get the information from NBC on it.

The Court: And then file it in stipulation form. Send it up and have him sign it, and file it.

Mr. Rudin: We rest subject to that.

The Court: All right. Now, how about you, Mr. Hoppe, do you rest, too?

Mr. Hoppe: I would like to rest.

The Court: Wait a minute.

(A short intermission.)

The Court: All right, Mr. Hoppe?

Mr. Hoppe: Your Honor, before proceeding I would like to make a motion to strike, to make the record clear on my position in the case.

The Court: All right.

Mr. Hoppe: It won't take long.

The Court: All right.

Mr. Hoppe: I would like to strike Defendants' Exhibit C, on the ground that the comparative chart compares only the question in the first bar of each of the comparative songs and does not purport to compare the other questions relating in the songs, but bases the comparison on where things appear in the song rather than in relationship to their subject [273] matter.

I make a motion to strike Defendants' Exhibit D, on the ground that it is not the best evidence of the matters that appear on Defendants' Exhibit D



and on the further ground that the expert conceded on the witness stand that it was not an accurate reproduction of the things which appeared in the source materials.

I make a motion to strike Exhibit E, on the ground that it is not the best evidence of the matters which are reported thereon.

I make a motion to strike the comparison chart—I can't see the number of it—it is at the back of Exhibit E—on the ground that it does not purport to align the questions one with the other except with respect to the first question.

I make a motion to strike all the testimony that is based upon the exhibits which I have moved to strike, on the ground that there is no foundation for such testimony.

The Court: I will deny the motions to strike.

Mr. Hoppe: Now, your Honor, I have no further testimony, but I would like leave to introduce in evidence two certified copies of papers which I have just located today, based upon—first, of all, I will offer in evidence the Certificate of Copyright, Number 191310, issued to Charles Douglass Hone, covering “Happy Pay Off Day,” [274] dated January 25, 1950, which I have just obtained from counsel, and Certificate of Copyright Registration Number 45529, dated April 17, 1950, also covering “Happy Pay Off Day,” as Plaintiff's exhibits next in order.

The Court: All right.

Mr. Ruiz: No objection.

Mr. Rudin: No objection.

The Clerk: Those will be Plaintiff's Exhibits 17 and 18 in evidence.

The Court: All right.

(Said documents were received in evidence and marked as Plaintiff's Exhibits 17 and 18, respectively.)

Mr. Hoppe: Now, your Honor, on one of those exhibits, which I saw for the first time before the lunch hour, there is reference to a Golden West Music Press to whom the Copyright Certificate was to be returned.

The Court: Can you wait just a second?

Mr. Hoppe: Yes, sir.

(A short intermission.)

The Court: All right.

Mr. Hoppe: Now, your Honor, with reference to the matter that I started to go into, counsel for the opponents and I are going to try to get together and stipulate [275] as to the facts with reference to the matter.

The Court: Yes.

Mr. Hoppe: And I would like to have our proofs held over until we can reach an understanding as to that. Other than that, we are through.

Mr. Rudin: We are through.

Mr. Ruiz: A stipulation with respect to what items?

Mr. Hoppe: That is with respect to who owns Westmore Music Corporation, who owns Golden West Music publishers, where they are located, and

who owns Golden West Music Press, and the relationship, if any.

Mr. Ruiz: What is the materiality here, counsel? I am lost here. I know you gentlemen have been talking.

Mr. Rudin: He wants to put it in.

Mr. Ruiz: He says he wants to put it in.

The Court: How do you propose to put it in, Mr. Hoppe?

Mr. Hoppe: These are facts I found out just today, your Honor.

The Court: All right.

Mr. Ruiz: What is the materiality, counsel?

The Court: Let us wait until he finishes here.

Mr. Hoppe: Here is the materiality: We have in evidence a contract that Westmore Music Corporation presented to our client for signature in 1942, in which it appears that they had the music before them at that [276] time. Now, we find that Golden West Music Press was the printer of the music, one of the sheets of music which is charged to be an infringement. Using that as a basis—I found that out just before this luncheon recess, your Honor, about this Golden West Music Press—I then went over to the records in the County Recorder's office, the Corporation Division, and found out that Golden West Music Publishers was located down here in Los Angeles and was run by a Sylvester L. Cross. I also found out that Westmore Music Corporation was a corporation which was run by Sylvester L. Cross. I think that that evidence will definitely place the music down here in Los An-

geles, and if Golden West Music Publishers and Golden West Music Press are the same people it will definitely place the music in the hands of the defendants. Now, I am not making the representation that that exists, and counsel and I are going to try to reach an understanding as to it, but, if it does exist I think it would be very material on the question of access, because at the opening statement I said that we had no direct evidence of access; we had only the circumstantial evidence which has gone in the record here. If this chain linkage that I believe exists is true, it would prove direct access. If part of the chain is true, it would put the music down here in the Los Angeles area in 1942. So it would either be [277] wholly material on the question of direct evidence as to access, or, in the alternative, it would be added circumstantial evidence showing access by the music being in the Hollywood area in 1942.

Mr. Rudin: Your Honor, I don't know where he got the name or where it appears, of Golden West Music Press. Fortunately this is a chain I wouldn't want to hang by, because I know a little bit, our firm being involved in the music business, about these various people he is talking about.

Sylvester Cross runs what we refer to as Hill Billy under a few names. He might have one of them called Golden West Music Publishers. Basically it is Golden West Music publishing. There is no connection with any of the defendants in this action. In fact, it is a competitor of Hill and Range Songs. Whether he uses the name Westmore



Music or Golden West Music Publishers, I don't know.

There is a little old print shop on Highland Avenue that prints sheet music, called Golden West Music Press, that is what it is called, and we have got it listed here as the Golden West Musical Publishing Company in 1929 of Julius Levinson. I think you will find that is the same Julius Levinson still printing music over on Highland Avenue. It has nothing to do with the [278] alleged access. It has nothing to do with these defendants. I don't know what the chain is.

If you want to prove the corporate organization of any of these chains, get a corporate certificate from the Secretary of State and we will stipulate that those are the facts, but we will not stipulate to the materiality, your Honor, because I don't know what Golden West Music Press itself has to do with it.

Mr. Ruiz: I think we are unduly prolonging this matter. I don't see the materiality whatsoever, unless it is connected with one of the defendants in this action.

If in this Los Angeles area they took at some time or another one of these pieces to a Mr. Smith or a Mr. Jones, it is still immaterial; it doesn't show access whatsoever.

The Court: Well, I think you have enough in the record just by your statement, Mr. Hoppe. I think that is sufficient.

Mr. Hoppe: All right, your Honor.



The Court: I mean that is my thought on it. You have stated it before the court.

Mr. Rudin: Golden West Music Press, your Honor, is not the same as Golden West Music Publishing Company. I don't know who is going to tie up by this.

Mr. Hoppe: Without bothering your Honor with it, I [279] think before the matter is completely briefed, if we are going to brief it, we can reach an understanding as to what it is. I suggest——

Mr. Ruiz: If it were material, yes.

Mr. Rudin: I think I can solve the problem, your Honor.

The Court: Well, I have his statement. Do you have a suggestion, Mr. Hoppe?

Mr. Rudin: Seriously, let Mr. Hoppe check on Highland Avenue and find out if the Golden West Music Press isn't Julius and his two associates who are running the print shop and have nothing to do with Sylvester Cross and that may satisfy him. If he wants to put in any evidence as to corporate organizations——

The Court: He can put it in his opening brief.

Mr. Rudin: Put it in his opening brief. We will stipulate to it, but we won't admit to the materiality of it.

The Court: Put it in your opening brief and we will file it, and the clerk will give it a number. How is that? If you feel that you want it.

Mr. Hoppe: I may be on a wild goose chase, your Honor.

The Court: Well, we will have that understand-

ing. You put it in your opening brief and we will make it an exhibit if you feel that it is that way. Of course, I have their objection to the materiality, and I will rule on the [280] matter and then I will send Mr. Rudin, Mr. Wolff and Mr. Ruiz a card as to to what my ruling is on the exhibit.

Mr. Hoppe: I think that is all right.

The Court: I think that is the fair way. With that, the case will be submitted. Now, just one question: What do you want, about 20 days?

Mr. Hoppe: I would like 20 days, your Honor.

The Court: What do you want, twenty to reply?

Mr. Ruiz: Do you think briefs are necessary?

The Court: Well, counsel is going back to San Francisco and he wants to submit the matter.

Mr. Rudin: I would like to file a brief and Mr. Ruiz may want to join in our brief.

The Court: Yes. Mr. Hoppe is going back to San Francisco.

Then, you will have 20 days and they will have 20 days, that is forty; and then say ten days to reply?

Mr. Hoppe: Ten to reply.

The Court: Yes. If I fix the time, it is better. In other words, 20, 20 and 10. Then if you have any difficulty you don't need to send a stipulation; just write the attorney and send us a copy, if you want a little additional time. Then at the conclusion of the matter the court will mark the matter submitted. Is that satisfactory? [281]

Mr. Hoppe: Fine, your Honor.

The Court: All right. Then it will be up to Mr.

Ruiz to join in the brief or file his own brief. He can confer with Mr. Wolff and Mr. Rudin on that matter, but I think that you will have to send Mr. Ruiz a copy of your brief, too.

Mr. Hoppe: I certainly will, your Honor.

The Court: Yes. Very well.

Mr. Hoppe: And you like to have two copies here?

The Court: Yes. Well, as a rule we require two.

The Clerk: Two.

The Court: One for the office file of the clerk and one for the court's file.

The Clerk: In duplicate.

The Court: In duplicate. So that you will make four copies.

We are going to allow them to take that Exhibit F and have it photostated and filed, just the cover and the first page, wasn't that the understanding?

The Clerk: The cover and the first page.

The Court: Yes. So that exhibit is withdrawn. Thank you.

Mr. Hoppe: Thank you for a nice hearing, your Honor.

The Court: All right.

[Endorsed]: Filed March 21, 1958. [282]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages, numbered 1 to 127, inclusive, containing the original:

Complaint.

Order re Change of Venue (copy).

Amended Complaint.

Answer of Carl Hoefle and Delmar Porter to First Amended Complaint.

Answer of Capitol Records, Inc., and Capitol Records Distributing Corp., to First Amended Complaint.

Answer of Hill and Range Songs, Inc., and Rumbalero Music, Inc., to First Amended Complaint.

Answer of Broadcast Music, Inc., to First Amended Complaint.

Answer of Decca Records, Inc., to First Amended Complaint.

Answer of Lowe's, Incorporated, to First Amended Complaint.

Answer of Radio Corporation of America to First Amended Complaint.

Answer of Columbia Records, Inc., to First Amended Complaint.

Order for Findings of Fact, Conclusions of Law and Judgment.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Motion to Fix Attorney's Fees.

Affidavit of Milton A. Rudin in support of motion to fix Attorney's Fees.

Affidavit of Plaintiff in Opposition to Motion to Fix Attorney's Fees.

Minute Order, 1/27/58, re Denial of Motion to Fix Attorney's Fees.

Plaintiff's Notice of Appeal.

Plaintiff-Appellant's Designation of Contents of Record on Appeal.

Plaintiff-Appellant's Statement of Points on Appeal.

Proof of Service.

Amended Proof of Service.

Defendants-Appellants Notice of Appeal.

Designation by Defendants-Appellants of Contents of Record on Appeal.

Defendants-Appellant's Statement of Points on Appeal.

Notice of Motion and Motion to Extend Time for Filing Record and Docketing Appeal and Order Thereon.

B. Plaintiff's Exhibits Nos. 1 to 18, inclusive.

Defendant's Exhibits A to S, inclusive.

C. Reporter's Official Transcript of Proceedings had on: 9-17-57; 9-18-57; and 9-19-57.



I further certify my fee for preparing the foregoing record, amounting to \$2.00, has been paid by appellant.

Dated: April 8, 1958.

[Seal]                      JOHN A. CHILDRESS,  
Clerk;

By /s/ WM. A. WHITE,  
Deputy Clerk.

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[Endorsed]: No. 15973. United States Court of Appeals for the Ninth Circuit. Mildred Becker Schultz, Appellant, vs. Jack Holmes, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 9, 1958.

Docketed April 11, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15973

MILDRED BECKER SCHULTZ,

Appellant,

vs.

JACK HOLMES, et al.,

Appellees.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF PORTION OF  
RECORD TO BE PRINTED

Appellant Mildred Becker Schultz, in accordance with Rule 17.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, states that the points upon which she intends to rely upon her appeal from the Final Judgment entered by the District Court on January 8, 1958, are as follows:

1. The District Court erred in ordering, adjudging and decreeing that plaintiff, Mildred Becker Schultz, take nothing by her amended complaint herein.

2. The District Court erred in ordering, adjudging and decreeing that defendants have judgment for their costs of suit.

3. The District Court erred in finding that Jack Holmes composed the music of the compositions

entitled "Happy Pay Off Day" and "The Blacksmith Blues" (Finding of Fact No. 5).

4. The District Court erred in finding that the musical compositions "Happy Pay Off Day" and "The Blacksmith Blues" were original with Jack Holmes (Finding of Fact No. 5).

5. The District Court erred in finding defendants herein, other than Jack Holmes, originally named as a defendant, are licensees and/or assignees of certain rights to publish, publicly perform for profit, record and distribute phonograph recordings of, and otherwise exploit, said "Happy Pay Off Day" and "The Blacksmith Blues" (Finding of Fact No. 6).

6. The District Court erred in finding that plaintiff did not submit a copy of her compositions, or either of them, to Jack Holmes or to defendants, or any of them, prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 10).

7. The District Court erred in finding that it is not true that Jack Holmes, or defendants, or any of them, had ever seen a copy, or heard a performance of plaintiff's compositions, or either of them, or in any other way were aware of the existence of plaintiff's compositions prior to Jack Holmes' composition of "Happy Pay Off Day" and "The Blacksmith Blues," as aforesaid (Finding of Fact No. 11).

8. The District Court erred in failing to find that plaintiff did disseminate her musical composition widely for purposes of consideration among musicians, arrangers, publishers and others in the musical industry.

9. The District Court erred in failing to find that defendants, and each of them, received copies of her musical composition.

10. The District Court erred in finding that insofar as musical material in "Happy Pay Off Day" and "The Blacksmith Blues" bears any similarity to "Good Old Army" or "Waitin' For My Baby," such musical material was not copied or prepared from plaintiff's compositions (Finding of Fact No. 12).

11. The District Court erred in finding that the common utilization by different compositions of a few notes such as herein found to exist occurs frequently in the field of popular music, particularly because of the limited number of pleasing tonal combinations within the average person's range of voice and skill (Finding of Fact No. 12).

12. The District Court erred in finding that, because of differences set forth in Finding 13, the first measure of the respective compositions of plaintiff and Holmes, when performed, convey to the average listener, as well as to a person skilled in music, a substantially different musical sound, feeling and impression (Finding of Fact No. 14).

13. The District Court erred in finding that the construction, modulations, phrasing, musical notes, and other musical material contained in "Happy Pay Off Day" and "The Blacksmith Blues" are not similar to that of "Good Old Army" and "Waitin' for My Baby" (Finding of Fact No. 15).

14. The District Court erred in finding that a performance of either "Good Old Army" or "Waitin' for My Baby" does not convey or give an impression to the average listener, of similarity or resemblance to "Happy Pay Off Day" or "The Blacksmith Blues," in any particular or taken as a whole (Finding of Fact No. 16).

15. The District Court erred in finding that neither all of "Happy Pay Off Day" or "The Blacksmith Blues," nor any part thereof, was copied or prepared from "Good Old Army" or "Waitin' for My Baby," or any part thereof (Finding of Fact No. 17).

16. The District Court erred in finding that it is not true that Jack Holmes or defendants, or any of them, have used the results of plaintiff's labors and incorporated the results thereof in "Happy Pay Off Day" or "The Blacksmith Blues," by the publishing, selling, and otherwise marketing of said compositions (Finding of Fact of No. 18).

17. The District Court erred in failing to find that Jack Holmes, alias Charles Douglas Hone, copied from plaintiff's copyrighted compositions "Good Old Army" or "Waitin' for My Baby" or



from both of them when he wrote the music of the musical compositions entitled "Happy Pay Off Day" and "The Blacksmith Blues."

18. The District Court erred in failing to find that defendants, and each of them, used the results of plaintiff's labors and incorporated such results in the infringing musical compositions "Happy Pay Off Day" and "The Blacksmith Blues."

19. The District Court erred in concluding that neither of the compositions, "Happy Pay Off Day" nor "The Blacksmith Blues," are infringements upon plaintiff's compositions "Good Old Army" or "Waitin' for My Baby" (Conclusion of Law No. II).

20. The District Court erred in failing to conclude that the composition "Happy Pay Off Day" and "The Blacksmith Blues" are both infringements upon plaintiff's compositions "Good Old Army" and "Waitin' for My Baby."

21. The District Court erred in concluding defendants herein are not guilty of having engaged in unfair trade practices or unfair competition by their having published, sold, and otherwise marketed the compositions, "Happy Pay Off Day" and "The Blacksmith Blues" (Conclusion of Law No. III).

22. The District Court erred in concluding that defendants are entitled to judgment herein for their costs of suit incurred herein (Conclusion of Law No. IV).

23. The District Court erred in failing to find that plaintiff is entitled to judgment as prayed in the Amended Complaint filed March 18, 1955.

\* \* \*

Appellant further designates that plaintiff's Exhibits 2, 3, 5, 6, 8, 12, 14, 15, 16 and defendant's Exhibits D, E and F are documentary exhibits which are material to the appeal. Appellant will incorporate them into books of exhibits to be prepared by appellant and to be delivered by appellant to appellee in accordance with prevailing practice in the Ninth Circuit.

/s/ CECIL HOPPE,  
One of the Attorneys for  
Appellant.

Proof of service attached.

[Endorsed]: Filed May 9, 1958.